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REMARKABLE EVOLUTION: THE EARLY CONSTITUTIONAL HISTORY OF MARYLAND

Charles A. Rees†

Maryland's history shows a remarkable constitutional evolution. At its founding, the province of Maryland was subject to the largely unwritten British constitution and to a kind of constitution, the 1632 Charter of Maryland, which was the British King's grant in the Latin language of land and governance to the Proprietor, Lord Baltimore and his heirs.¹ Maryland's first constitution of the people in 1776 was legislated by the governing body of the state, albeit one elected for the purpose of forming a new government, but the Constitution of 1776 was not ratified by the people.² Subsequent revised Maryland constitutions in 1851, 1864, and 1867 were proposed by specially elected constitutional conventions and adopted by vote of the people.³ Since 1851, the constitutions of Maryland have included a provision calling on the legislature to determine, at periodic general elections, the "sense of the people" about whether a constitutional convention should be called.⁴ Since the Constitution of 1776, Maryland's constitutions have been frequently revised and amended.⁵ Maryland's constitutions, beginning with that of 1776, have been in the English language. Thus, Maryland's "constitution" was originally a grant, written in Latin (and against the backdrop of a largely unwritten British constitution), from the British King to a noble family. Now the Constitution is a home-grown, regularly-reconsidered compact of the people written in their own language.

I. INTRODUCTION

After a brief primer on constitutions, this Article tells the story of the evolution of Maryland's Constitution from 1632 to 1851. That story includes not only the remarkable evolution described above, but also a number of developments important to American constitutional history. This history of the Maryland Constitution

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1. See *infra* Part III(A).
2. See *infra* Part IV(C).
3. See *infra* Part V(D).
4. See *infra* Part V(D).
5. See *infra* Parts V(B)–(D).

spans the colonial era, revolutionary times, and early statehood (before the Civil War).

In the colonial era, the 1632 Charter of Maryland provided a kind of constitution and a representative assembly for the Province of Maryland, one of the first in the colonies.⁶ An "Act ordeining certain Laws for the Government of this Province,"⁷ enacted in 1639, was a temporary legislative bill of rights and perhaps "the first American Bill of Rights."⁸ An "Act Concerning Religion," also known as the Toleration Act of 1649, recognized a measure of freedom of conscience and was probably the first document protecting the free exercise of religion.⁹

In revolutionary times, an Association of the Freemen of Maryland (1775) helped establish a republican form of government and placed Maryland in a union of American colonies.¹⁰ A Declaration, dated July 6, 1776, proclaimed Maryland an independent state, based on the sovereignty of the people.¹¹ Maryland's first constitution of the people, also in 1776, had separated powers and a Declaration of Rights.¹²

In the early statehood period, the case of *Whittington v. Polk*,¹³ like *Marbury v. Madison*¹⁴ in the United States Supreme Court, established judicial review, *i.e.*, that courts are the primary interpreters and enforcers of the constitution.¹⁵ Amendments to the constitution in 1802, 1810, and afterward extended the franchise beyond those initially entitled to vote, *i.e.*, free, white, male, 21 years of age, and property owners.¹⁶ Reform amendments to the constitution (1837–1838) provided direct popular elections of certain state officials and reapportionment of the House of Delegates, the lower house of the Maryland General Assembly.¹⁷ The Constitution of 1851 provided for popular participation in constitutional change by regularly taking "the sense of the people" as to calling a constitutional convention.¹⁸

Some developments *after* 1851 are briefly described [in bolded brackets] to show how matters have continued to evolve.

6. See *infra* Part III(A).

7. See *infra* Part III(B).

8. See Charles A. Rees, *The First American Bill of Rights: Was it Maryland's 1639 Act for the Liberties of the People?*, 31 U. BALT. L. REV. 41, 62-65 (2001).

9. See *infra* Part III(C).

10. See *infra* Part IV(A).

11. See *infra* Part IV(B).

12. See *infra* Part IV(C).

13. 1 H. & J. 236 (Md. Gen. Ct. 1802).

14. 5 U.S. 137 (1803).

15. See *infra* Part V(A).

16. See *infra* Part V(B).

17. See *infra* Part V(C).

18. See *infra* Part V(D).

II. A PRIMER ON CONSTITUTIONS

America is the home of the written constitution. The United States, Maryland, and the other forty-nine states, each has one.¹⁹ Some preliminary questions: What is a constitution? What is a written constitution? Why do the United States and the states have written constitutions? What are American constitutions like? How do state constitutions compare with the United States Constitution? How do the state constitutions compare with one another? This section will serve as a primer to help answer these questions.

What is a constitution? A constitution is a set of fundamental principles of government.²⁰ In America, those principles, consented to by the people, provide a rule of law for both the government and the people.²¹ The rule of law substitutes for the whim of a dictator, the divine right of a monarch, the word from an oracle or seer, the calculations of an astrologer, or the revelation of a priest or prophet.²²

What is a written constitution? The largely unwritten British constitution is based on tradition and is subject to change by Parliament.²³ Other constitutions came to be written down so that the fundamental principles of government would be fixed and definite, not misunderstood or forgotten.²⁴ Yet, some early constitutional documents, like England's Magna Carta from 1215 and the Charter of Maryland from 1632, were written in Latin, the language of the royal court, churchmen, and scholars.²⁵ Constitutions based upon popular consent are written in the common language of the people, who can then read or listen to the constitutions and understand what they mean. The written nature

19. See generally ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES at xiii (2006) (containing the text of the United States Constitution and explaining the key provisions of each of the individual states' constitutions, as well as the constitutions of United States' territories, such as Puerto Rico and the Northern Mariana Islands).

20. See 1 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 1-2 (1963) [hereinafter COMMENTARY ON THE CONSTITUTION].

21. See *id.*

22. See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6 (1982).

23. COMMENTARY ON THE CONSTITUTION, *supra* note 20, at 15-16.

24. *Id.* at 16.

25. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS xi (Richard L. Perry ed., 1991) (1978) [hereinafter Perry]; 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 350-58 (William F. Swindler ed., 1975) [hereinafter Swindler]; 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1669-77 (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe].

of constitutions came to mean that they were superior to ordinary laws and could not be changed by an ordinary act of government.²⁶ That is, written constitutions came to mean that constitutional government is limited government.²⁷

Why do the United States and the states have written constitutions? By 1776 the American colonial experience, and beyond that the British and European experience, with government was one of conflict between rulers and people.²⁸ The earliest American constitutions, such as the Maryland Constitution, set forth reasons for the American Revolution and independence of 1776 from Great Britain.²⁹ The constitutions showed popular consent to forming new state and national governments.³⁰ The constitutions also told what was and what was not changed from colonial governance.³¹ Later, other states followed this tradition of adopting written constitutions.³²

What are American constitutions like? Typically, American constitutions include a preamble, a bill of rights, and a frame of government.³³ The preamble tells the purposes of the framers for adopting the constitution.³⁴ The bill of rights recognizes what protections the people have against the government.³⁵ The frame

26. See *infra* Part V(A).

27. COMMENTARY ON THE CONSTITUTION, *supra* note 20, at 16.

28. See *infra* Parts IV(A)–(B); cf. WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 2-3 (1910) (stating that state constitutions may have taken a different form were it not for the Revolutionary period being one of war and not peace).

29. 4 Swindler, *supra* note 25, at 372 (reproducing the Maryland Constitution of 1776).

30. 4 *id.* at 372-73.

31. 4 *id.* at 372.

32. See MADDEX, *supra* note 19. Now every state has a written constitution, including Alaska and Hawaii, admitted to the Union in 1959. See generally HAW. CONST.; ALASKA CONST.

33. MADDEX, *supra* note 19, at xix-xxiii.

34. The preamble to the United States Constitution states:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

U.S. CONST. pmbl. The preamble to the Maryland Declaration of Rights reads:

We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare

MD. DECL. OF RIGHTS pmbl. The preamble has remained unchanged since the Constitution of 1851. 4 Swindler, *supra* note 25, at 393, 448.

35. MADDEX, *supra* note 19, at xix-xx. See, e.g., U.S. CONST. amend. I-X; MD. DECL. OF RIGHTS arts. 1-47.

of government establishes separate legislative, executive, and judicial branches, describes their powers and the limitations on those powers, and sets forth the checks and balances among the three branches.³⁶ Notably, American constitutions show the extension of the rights to vote and hold office.³⁷ Typically, the earliest American constitutions limited those rights to persons who were free, white, male, 21 years of age, and property owners.³⁸ Those rights have since been extended, in typical order, to persons without property, to all races, to women, and finally to persons age 18 or older.³⁹

How do state constitutions compare with the United States Constitution? In theory, the federal government is one of limited powers, so the United States Constitution enumerates those powers;⁴⁰ the states have general powers, so the state constitutions need not enumerate those powers.⁴¹ Functionally, the United States Constitution defines our federal system—a national government, the states, and the interrelationships between the national government and the states, as well as relations among the states themselves;⁴² the state constitutions provide for local governments—counties, municipalities, and other local subdivisions.⁴³ Topically, the United States Constitution has special interests in a union of the states,⁴⁴ interstate and foreign commerce,⁴⁵ national defense,⁴⁶ and international relations;⁴⁷ the state constitutions have some special interests in local government,⁴⁸ public education,⁴⁹ business corporations,⁵⁰ and economic development.⁵¹ The United States Constitution, being a compromise among states with diverse interests and being difficult to amend, is short;⁵² each of the state constitutions, being a product of one political unit and easier to amend, are longer.⁵³ Thus, state

36. MADDEX, *supra* note 19, at xx-xxiii. See, e.g., U.S. CONST. arts. I-III.

37. See, e.g., U.S. CONST. arts. I, §§ 2-3, II, § 1.

38. See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003); see also Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 336 n.24 (1993).

39. Karlan, *supra* note 38, at 1345.

40. See, e.g., U.S. CONST. art. I, § 8; see also MADDEX, *supra* note 19, at xviii.

41. MADDEX, *supra* note 19, at xviii.

42. See U.S. CONST. arts. I-VI.

43. See, e.g., MD. CONST. art. XI – XI-I, VA. CONST. art. VII.

44. U.S. CONST. pmbl.

45. U.S. CONST. art. I, §§ 8-10.

46. U.S. CONST. arts. I, § 8, II, § 2.

47. U.S. CONST. art. II, § 2.

48. See MADDEX, *supra* note 19, at xxiii-xxiv.

49. See, e.g., MD. CONST. art. VIII.

50. See, e.g., ALA. CONST. art. XIV.

51. See, e.g., MD. CONST. art. XI-B.

52. See MADDEX, *supra* note 19, at xix.

53. See *id.*

constitutions usually show more innovations in government, such as provisions for a balanced budget,⁵⁴ line item veto,⁵⁵ initiative,⁵⁶ referendum,⁵⁷ recall,⁵⁸ and term limits on office-holders.⁵⁹ In addition, state constitutions often include new rights, such as privacy, equality based on sex, tax limitations, and protection for victims of crime.⁶⁰

How do the state constitutions compare with one another? The states in our federal system are fifty "laboratories of democracy."⁶¹ Their constitutions reflect a variety of traditions, eras, and influences. Maryland and almost all others follow the English common law tradition.⁶² Many state constitutions, like Maryland's of 1776, 1851, 1864, and 1867, have gone through a number of revisions.⁶³ State constitutions may reflect various eras of American political history—revolutionary, federalist, Jeffersonian republicanism, Jacksonian democracy, states' rights, Civil War and reconstruction, progressive, civil rights, and the like.⁶⁴ State constitutions may show the influence of earlier or contemporaneous constitutions of other states. In the case of Maryland's Constitution of 1776, the earlier influential constitution was that of Virginia.⁶⁵ Maryland and other states' constitutions, drafted or revised after the United States Constitution, show its influence.⁶⁶

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54. See, e.g., MD. CONST. art. III, § 52; see also MADDEX, *supra* note 19, at xv.
 55. See, e.g., CAL. CONST. art. IV, § 10(e); see also MADDEX, *supra* note 19, at xv.
 56. See, e.g., CAL. CONST. art. II, § 8; see also MADDEX, *supra* note 19, at xv.
 57. See, e.g., MD. CONST. art. XVI; CAL. CONST. art. II, § 9; see also MADDEX, *supra* note 19, at xv.
 58. See, e.g., CAL. CONST. art. II, §§ 13-19; see also MADDEX, *supra* note 19, at xv.
 59. MADDEX, *supra* note 19, at xv.
 60. *Id.* at xiv.
 61. See *New State Ice, Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
 62. Of notable significance is Louisiana, which has a civil law tradition. MADDEX, *supra* note 19, at 151-52.
 63. See MADDEX, *supra* note 19, at xxxii-xxxvii.
 64. See *id.*
 65. Compare 4 Swindler, *supra* note 25, at 340, 372-83 (Maryland Declaration of Rights of 1776, effective November 3, and Maryland Constitution of 1776, effective November 8) with 10 *id.* at 5, 48-56 (Virginia Declaration of Rights of 1776, effective June 12, and Virginia Constitution of 1776, effective June 29); see also DAVID CURTIS SKAGGS, *ROOTS OF MARYLAND DEMOCRACY, 1753-1776*, at 191, 195 (1973).
 66. See MADDEX, *supra* note 19, at xix.

III. THE COLONIAL ERA

A. *The Charter of Maryland (1632)—A Kind of Constitution and a Representative Assembly.*

The Charter of Maryland of 1632⁶⁷ provided a kind of constitution for the Province of Maryland. By that document, written in Latin, King Charles I of England granted territory in America for colonization to Cecil Calvert, the Second Lord Baltimore, and his heirs (the Proprietor).⁶⁸ Although the Charter granted broad powers to the Proprietor and reserved others to the King, it also established fundamental principles of government, providing a primitive rule of law for both the Proprietor and the people who settled the territory.⁶⁹

Those fundamental principles or that primitive rule of law, from the colonists' point of view, came to include a number of important points. First, the acts of the government of the Province were subject to higher law, the Charter (Maryland's constitution) and beyond it the laws and customs of England (England's unwritten constitution).⁷⁰ The Charter, a blueprint for the government of the Province of Maryland, provided the legal basis for the government.⁷¹ Specifically, Article VII of the Charter limited the laws, made by the assembly of freemen and the Proprietor, to those which would "be consonant to Reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England."⁷² Article VIII of the Charter similarly limited the emergency ordinances, made by the Proprietor.⁷³

There were many questions about how this principle of higher law, typical of English colonial charters, operated.⁷⁴ How was the higher law check on provincial law exercised—by the judiciary in court cases or by the executive reviewing acts of the assembly? Who had a remedy, if provincial law was contrary to higher law—the grantee of the charter (the Proprietor), the grantor (the Crown),

67. 4 Swindler, *supra* note 25, at 350-67 (including Latin and English versions); 3 Thorpe, *supra* note 25, at 1669-86 (including Latin and English versions); *also available at* <http://www.mdarchives.state.md.us/msa/educ/exhibits/founding/html/relation.html> (last visited Mar. 31, 2007).

68. 4 Swindler, *supra* note 25, at 358-59.

69. *Id.* at 360-67.

70. *Id.* at 360-61 (describing the authority of the colonists to enact laws).

71. *Id.* at 360-66.

72. *Id.* at 361.

73. *Id.* at 361-62.

74. See, e.g., ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 145, 147, 165, 174, 208, 215, 226-27 (Octagon Books 1976) (1915); JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (Octagon Books, Inc. 1965) (1950).

or the apparent beneficiaries of some articles of the Charter (the settlers)? Was all English law—statutes, as well as common law—part of the higher law, which checked provincial laws? Were there exceptions to the application of English law for protecting the prerogatives of the Proprietor (or the Crown) or for assuring that such law was suitable to the local circumstances of the province? What was the effect of a determination that provincial law was contrary to English law? In any event, as we shall see, the principle of higher law evolved into the practice of judicial review, beginning with *Whittington v. Polk*.⁷⁵

Second, the settlers were to retain all the rights of Englishmen. Article X of the Charter, again typical of English colonial charters, provided that the settlers and their descendants were “Subjects and Leige-Men” of the English Crown; they were to be “held, treated, reputed, and esteemed” as such, and they possessed and enjoyed property rights and “all Privileges, Franchises and Liberties” of persons born in England.⁷⁶ Throughout the colonial period, Maryland colonists struggled to specify and secure those rights.⁷⁷ As we shall see, one of the most notable occasions was in 1639 in the “Act ordaining certain Laws for the Government of this Province.”⁷⁸

Third, the government of the Province was to include an assembly of freemen, a measure of representative self-government.⁷⁹ The Province had the third representative assembly in America, after those of Virginia and Massachusetts Bay.⁸⁰ Article VII of the Charter of Maryland authorized the Proprietor “to Ordain, Make, and Enact Laws, of what Kind soever, . . . of and with the Advice, Assent, and Approbation of the Free-Men of the same Province, . . . or of their Delegates or Deputies, whom We will shall be called together for the framing of Laws”⁸¹ That Charter provision was ambiguous as to the roles of the Proprietor and the General Assembly, as it came to be called. However, by 1639 the General Assembly, with the Proprietor’s acquiescence, had taken the initiative on legislation, generally leaving to the Proprietor only the power to approve or veto.⁸² At

75. 1 H. & J. 236 (Md. Gen. Ct. 1802); *see infra* Part V(A).

76. 4 Swindler, *supra* note 25, at 362.

77. *See infra* Parts III(B)–(C).

78. *See infra* Part III(B).

79. 4 Swindler, *supra* note 25, at 360–61.

80. 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 67 (Leon Friedman ed., 1971) [hereinafter BILL OF RIGHTS].

81. 4 Swindler, *supra* note 25, at 360.

82. The Proprietor stated his acquiescence in an August 21, 1638 letter to his brother, Leonard Calvert, Lieutenant General of the Province, which was read the first day of the following General Assembly. 1 ARCHIVES OF MARYLAND 31 (William Hand Browne et al. eds., 1883 - 1947) [hereinafter, collectively ARCH. MD.]. The

the same time, the General Assembly determined that future assemblies should generally be representative—that (in addition to the officers and “Gentlemen” of the Province) several elected delegates, deputies, or burgesses from each “hundred” should take the place of the freemen, who earlier were present in person or by proxy.⁸³ In 1650, the General Assembly adopted the bicameral principle, that enactments required separate majorities of a lower house (burgesses) and an upper house (the governor and council).⁸⁴

Thus, the Charter provided a kind of constitution and an assembly of freemen, which was a measure of representative self-government for the Province of Maryland.

B. An “Act ordeining certain Laws for the Goverment of this Province” of 1639—The First American Bill of Rights.

The 1639 “Act ordeining certain Laws for the Goverment of this Province,”⁸⁵ adopted by the General Assembly of the Province and approved by the Lieutenant General (governor) in the name of the Proprietor, was perhaps “the first American Bill of Rights.”⁸⁶ That honor has generally been given a bill, an “Act for the liberties of the people,”⁸⁷ introduced in the General Assembly earlier in 1639.⁸⁸ However, the General Assembly never passed that bill.⁸⁹

The “Act ordeining certain Laws for the Goverment of this Province” was rudimentary. As suggested by its title, it was short

initiative of the General Assembly is reflected in a law, “An Act For the Establishing the house of Assembly and the Laws to be made therein,” and procedural orders, adopted that same day, February 25, 1638/39. *Id.* at 32-33, 81-82. The dating, “1638/39” in the Archives reflects the difference between the “old style” Julian calendar (used before 1752), with a new year beginning on March 25, and the “new style” Gregorian calendar (used beginning in 1752), with a new year beginning on January 1. See Rees, *supra* note 8, at 53. The “new style” dating will be used in this article.

83. See 1 ARCH. MD., *supra* note 82, at 81-82 (“An Act For the Establishing the house of Assembly and the Laws to be made therein” (Feb. 25, 1639)); see 1 *id.* at 82-84 (“An Act ordeining certain Laws for the Goverment of this Province” (Mar. 19, 1639)).

84. 1 *id.* at 272-73 (“An Act for the settling of this present Assembly” (Apr. 6, 1650)).

85. 1 *id.* at 82-84 (Mar. 19, 1639).

86. See Rees, *supra* note 8, at 62-65.

87. See *id.* at 41-44 n.13; 1 BILL OF RIGHTS, *supra* note 80, at 67.

88. 1 ARCH. MD., *supra* note 82, at 41 (providing the text of the Act).

89. The “Act for the liberties of the people” is set forth as one of 36 bills under a memorandum of the Secretary of the Province indicating that the bills were never passed. 1 *id.* at 39. Still earlier, a 1638 bill “for the liberties of the people,” passed the Assembly, 1 *id.* at 20, but was apparently vetoed by the Proprietor, presumably on the ground that only he and his governor had the power to propose laws. 3 *id.* at 49-51 (“Commission to Governor Leonard Calvert and Council” (Apr. 15, 1637)).

and simple,⁹⁰ a basic code of laws for the province. Four of its fifteen substantive paragraphs (after a preamble) set out rights of the settlers.⁹¹ The first paragraph provided for religious freedom stating, "Holy Churches within this province shall have all her rights and liberties."⁹² The fourth paragraph incorporated the rights of the people under English law declaring, "The Inhabitants of this Province shall have all their rights and liberties according to the great Charter of England[.]"⁹³ This paragraph recognized the rights of the people under the Magna Carta or, perhaps, the rights of the people under all the English constitutional documents, including the Petition of Right.⁹⁴ The fundamental rights provided under the Magna Carta were thought to include: (i) religious liberty,⁹⁵ (ii) no taxation except by the national assembly,⁹⁶ (iii) prohibition of arbitrary arrest, indictment by grand jury, trial by jury, full, free, speedy, and equal justice, habeas corpus, due process, and a prohibition on monopolies,⁹⁷ and (iv) travel.⁹⁸ In addition, the rights under the Petition of Right included freedom from quartering of soldiers and from martial law.⁹⁹ The "Act ordeining certain Laws for the Goverment of this Province," in its fifth paragraph for civil cases and in its sixth paragraph for criminal cases, required judges to take oaths to administer equal justice to all persons.¹⁰⁰ The sixth paragraph also required indictment and trial by jury in serious criminal cases.¹⁰¹

To be sure, the settlers' rights as Englishmen were already protected by Article X of the 1632 Charter of Maryland.¹⁰² However, the 1639 "Act ordeining certain Laws for the Goverment of this Province" improved upon the Charter's statement of rights in two ways. First, as we have seen, the Act was more specific than the Charter about what those rights were.¹⁰³ Second, the Act gave additional security to the specified rights. While the Charter was a grant from the Crown to the Proprietor, a grant which could be revoked, as it was when Maryland became a royal colony from

90. See 1 *id.* at 82-84 (the entire act contained a mere sixteen paragraphs).

91. 1 *id.*

92. 1 *id.*

93. 1 *id.*

94. See 1 BILL OF RIGHTS, *supra* note 80, at 4-29 (containing text and commentary of English antecedents to the United States Bill of Rights).

95. See 1 *id.* at 8; Rees, *supra* note 8, at 64.

96. See 1 BILL OF RIGHTS, *supra* note 80, at 9-10; Rees, *supra* note 8, at 63-64.

97. See 1 BILL OF RIGHTS, *supra* note 80, at 6-7, 12; Rees, *supra* note 8, at 63-64.

98. See 1 BILL OF RIGHTS, *supra* note 80, at 12; Rees, *supra* note 8, at 64.

99. See 1 BILL OF RIGHTS, *supra* note 80, at 20-21; Rees, *supra* note 8, at 64.

100. 1 ARCH. MD., *supra* note 82, at 83.

101. 1 *id.* at 83.

102. 4 Swindler, *supra* note 25, at 362.

103. See *supra* Parts III(A)-(B).

about 1689–1716,¹⁰⁴ the 1639 Act was by and for the settlers.¹⁰⁵ Similarly, the Magna Carta, invoked in the fourth paragraph of the Act, was in terms a bargain between King John and his barons.¹⁰⁶ Of course, the Magna Carta was later revised many times, but, typically, each of the later revisions was on the occasion of a new bargain—a new monarch recognizing the liberties of the barons (later, the freemen) in exchange for the barons renewing their allegiance to the Crown (later, Parliament agreeing to taxation).¹⁰⁷

In several ways, the 1639 Act illustrates why legislative acts are not enough, and why a constitution is needed, to protect rights. First, the third paragraph of the Act expressly reserved the prerogatives of the Proprietor.¹⁰⁸ Second, the fifteenth paragraph of the Act expressly made it temporary, to continue only until the end of the next General Assembly, but not longer than three years.¹⁰⁹ (Certain portions of the Act, including “the peoples liberties,” were revived, again temporarily, by the 1642 session of the General Assembly.)¹¹⁰ Thus, the “Act ordeining certain Laws for the Government of this Province” was subject to the wills of both the executive and the legislature.

Another notable attempt to specify the rights of the colonists as Englishmen, long before the American Revolution, was in 1728 by Daniel Dulany, the elder. In a pamphlet, *The Right of the Inhabitants of Maryland to the Benefit of the English Laws*,¹¹¹ Dulany claimed that colonists had the benefit of a number of English statutes, including the Magna Carta, the Petition of Right, the “Act Abolishing the Star Chamber” of 1641, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689.¹¹²

These early bills of rights were, generally, statements of the rights of colonists against the Proprietor. During times closer to the American Revolution, the colonists stated rights against the British Parliament and Crown. For example, on September 27, 1765, in protest against the Stamp Act, the House of Delegates

104. See 13 ARCH. MD., *supra* note 82, at v (editor’s preface), 229–47 (actions of the Associators’ Assembly in 1689), 425 (“An Act of Recognition” on June 2, 1692). See also 30 *id.* at ix–x (editor’s preface), 357–67 (Proceedings of the General Assembly on April 24, 1716).

105. See Rees, *supra* note 8, at 64–65.

106. See 1 BILL OF RIGHTS, *supra* note 80, at 8.

107. Perry, *supra* note 25, at 1–10.

108. 1 ARCH. MD., *supra* note 82, at 83.

109. 1 *id.* at 84.

110. 1 *id.* at 122 (“An Act For the putting in force of some Lawes for the Governm^t of the Province” (Mar. 23, 1642)).

111. St. George Leakin Sioussat, *The English Statutes in Maryland*, in 21 JOHNS HOPKINS UNIV. STUDIES IN HISTORICAL & POLITICAL SCIENCE at app. 2 at 81–104 (1903).

112. *Id.*

adopted eight resolves "declarative of the Constitutional Rights of the Freemen of this Province."¹¹³ Those resolves declared that the colonists, as Englishmen, had all the rights of the people of Great Britain, including rights granted by the Magna Carta, by other English constitutional documents, and by English statutes and common law, as well as rights granted by the 1632 Charter of Maryland.¹¹⁴ Specifically, those rights included taxation and regulation of internal government by the colonists' own legislature (rather than by the British Parliament in which the colonists had no representation), as well as trial by jury.¹¹⁵

Maryland's constitutions of 1776 and 1851 [as did later constitutions in 1864 and 1867] each contained a bill of rights, styled "Declaration of Rights."¹¹⁶

An attempt to add a federal bill of rights was made at the Maryland convention, held in April, 1788 to vote on ratification of the proposed Constitution of the United States.¹¹⁷ William Paca proposed amendments,¹¹⁸ many based on Maryland's own Declaration of Rights which Paca helped fashion in 1776.¹¹⁹ However, a committee of the convention, formed to consider amendments, could not agree on a report.¹²⁰ The desire for speedy ratification of the Constitution prevailed over the demand for a bill of rights.

Thus, the 1639 "Act ordeining certain Laws for the Government of this Province" was a rudimentary legislative "bill of rights" or an attempt to specify and secure the rights of the settlers as Englishmen, a matter of continuing interest for the settlers.

113. 59 ARCH. MD., *supra* note 82, at 28, 30-32. The argument for the right of the colonists to be free of taxation by Parliament, unless there was representation in that body, was further developed by Daniel Dulany, the younger, in "Considerations on the Propriety of Imposing Taxes in the British Colonies, For the Purpose of Raising a Revenue, by Act of Parliament," published in October, 1765, reprinted in 6 MD. HIST. MAG. 376-406 (1911); 7 MD. HIST. MAG. 26-59 (1912); *see also* ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT: 1634-1980 at 104 (1988).

114. 59 ARCH. MD., *supra* note 82, at 28, 30-32.

115. 59 *id.* at 28, 30-32.

116. 4 Swindler, *supra* note 25, at 372-75, 393-96, 417-20, 448-51.

117. 2 THE DEBATE ON THE CONSTITUTION 553-56 (Bernard Bailyn ed., 1993); 2 BILL OF RIGHTS, *supra* note 80, at 729-38; 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTIONS AT PHILADELPHIA 547-56 (Jonathan Elliot ed., J.D. Lippincott Co. 1941) (1936).

118. *See* 2 Bill of Rights, *supra* note 80, at 729-38.

119. *See* 4 Swindler, *supra* note 25, at 372-75.

120. *See* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 117, at 553.

C. “Act Concerning Religion,” or the Toleration Act of 1649—
Freedom of Conscience.

The 1649 Maryland “Act Concerning Religion,”¹²¹ also known as the Toleration Act, was the first American recognition of “a measure of freedom of conscience.”¹²² Indeed, the Act has been called the first document (in the Anglo-American tradition) protecting the free exercise of religion.¹²³

Maryland was founded on a principle of religious toleration.¹²⁴ True, the Charter of Maryland, while containing religious provisions was vague about religious freedom. Principally, Article II of the Charter recited that Lord Baltimore was motivated in part by a “Zeal for extending the Christian Religion”¹²⁵ to a region in America “partly occupied by Savages, having no knowledge of the Divine Being”¹²⁶ Article IV granted to the Proprietor the power to found Christian churches “according to the Ecclesiastical Laws of . . . England”¹²⁷ Article XXII provided that the Charter was to be interpreted so that, among other things, “God’s holy and true Christian Religion”¹²⁸ might not suffer. However, Lord Baltimore, a Catholic, established a colony that would not only be a haven for Catholics, but one that would attract Protestants, as well.¹²⁹ Lord Baltimore’s instructions to the first settlers, including some Catholics and many Protestants, required religious toleration.¹³⁰ Those instructions were reinforced by Lord Baltimore’s commissions to office-holders and the oaths of office he required of them.¹³¹

However, religious toleration between Catholics and Protestants was threatened by the rise of a fundamentalist Puritanism.¹³² In England, Puritan and parliamentary forces fought a civil war against royalists, leading to the overthrow of the monarchy in 1649

121. 1 ARCH. MD., *supra* note 82, at 244-47; 1 BILL OF RIGHTS, *supra* note 80, at 90-94; 4 Swindler, *supra* note 25, at 368-71.

122. 1 BILL OF RIGHTS, *supra* note 80, at 90; *cf. supra* note 92 and accompanying text (broad and vague protection of religious freedom—“Holy Churches within this province shall have all her rights and liberties.”).

123. 2 BILL OF RIGHTS, *supra* note 80, at 1204.

124. 1 *id.* at 90.

125. 4 Swindler, *supra* note 25, at 358.

126. 4 *id.*

127. 4 *id.* at 359-60.

128. 4 *id.* at 367.

129. BRUGGER, *supra* note 113, at 5-7.

130. See *Instructions to the Colonists by Lord Baltimore, 1633*, in NARRATIVES OF EARLY MARYLAND, 1633-1684 at 16, 23 (Clayton Colman Hall ed., 1910) [hereinafter *Instructions*].

131. *Id.* at 20-21.

132. See BRUGGER, *supra* note 113, at 18-21.

and the temporary establishment of a commonwealth.¹³³ In Maryland, too, Puritanism was growing.¹³⁴ The Proprietor sent the General Assembly a proposed law to ensure religious toleration for all Christians in the colony.¹³⁵ In an apparent compromise, the General Assembly adopted the Toleration Act.¹³⁶

The Act provided for "free exercise" of religion:

[N]oe person . . . within this Province, . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province . . . nor any way compelled to the beleife or exercise of any other Religion against his or her consent¹³⁷

In addition to the Proprietor's proposal for religious toleration, the Act included some Puritan elements. The Act provided for punishment of persons who blasphemed God, denied the Trinity, or profaned the Sabbath.¹³⁸

Still another provision of the Act reflects both Catholic and Puritan viewpoints. The Act provided for punishment of religious name-calling, including names for Catholics (priest, Jesuit, papist) and names for Puritans (Puritan, Independent, Roundhead).¹³⁹ One commentator has called this provision "America's First 'Hate Speech' Regulation."¹⁴⁰

The toleration provided by the Act was limited; it only provided toleration for Trinitarian Christians.¹⁴¹ As intimated, the Act also had some intolerant provisions, *i.e.*, punishment of blasphemy, Sabbath-breaking, and religious name-calling.¹⁴² Nonetheless, the Act helped promote the principle of religious toleration.¹⁴³

133. *See id.*

134. *See id.* at 20-21.

135. *See id.* at 20.

136. *See* Carl N. Everstine, *Maryland's Toleration Act: An Appraisal*, 79 MD HIST. MAG. 99 (1984); John D. Krugler, "With Promise of Liberty in Religion": *The Catholic Lords Baltimore and Toleration in Seventeenth-Century Maryland, 1634-1692*, 79 MD. HIST. MAG. 21, 25 (1984).

137. 1 ARCH. MD., *supra* note 82, at 246.

138. 1 *id.* at 244-46.

139. 1 *id.* at 245.

140. Michael W. McConnell, *America's First "Hate Speech" Regulation*, 9 CONST. COMMENT. 17 (1992).

141. *See* 1 ARCH. MD., *supra* note 82, at 244.

142. *See* 1 *id.* at 244-46.

143. *See* 1 *id.* at 246; *cf.* BRUGGER, *supra* note 113, at 20-21 (describing the positive and negative ramifications of the Act).

The toleration principle had several early setbacks. A later "Act Concerning Religion," effective from 1654 to 1657, while the province was under control of the Puritans, limited the free exercise of religion to Christians who were not Catholics.¹⁴⁴ The toleration principle was replaced in 1692 by the establishment of the Anglican Church,¹⁴⁵ which lasted until the Constitution of 1776.¹⁴⁶

After those early setbacks, however, the principle of religious toleration was extended. As we shall see, the Constitution of 1776, in Article 33 of the Declaration of Rights, ended the establishment of the Anglican Church.¹⁴⁷ (Additionally, an amendment to the Constitution of 1810 prohibited the tax support of any religion.¹⁴⁸) Article 33 also protected religious liberty, but only of Christians.¹⁴⁹ However, the Constitution of 1851, in Article 33 of the Declaration of Rights, broadened that liberty by abolishing the limitation to Christians.¹⁵⁰ During most of the establishment period, Catholics and other religious minorities could not vote or hold office.¹⁵¹ Religious limitations on voting were abolished by Article 2 of the Constitution of 1776.¹⁵² Religious tests for public office were also gradually eliminated. Constitutional amendments of 1795,¹⁵³ 1798,¹⁵⁴ and 1818¹⁵⁵ increasingly permitted members of minority Christian denominations to hold office.¹⁵⁶ A constitutional amendment in 1825 permitted Jewish individuals to hold office.¹⁵⁷ [The United States Supreme Court, in *Torcaso v. Watkins*,¹⁵⁸ held

144. 1 ARCH. MD., *supra* note 82, at 340-41 (text of "An Act Concerning Religion" (Oct. 20, 1654)), 351 (repeal of 1649 "Act Concerning Religion"); BRUGGER, *supra* note 113, at 21.

145. 13 ARCH. MD., *supra* note 82, at 425-30 ("An Act for the Service of Almighty God and the Establishment of the Protestant Religion Within this Province" (June 2, 1692)); *cf.* 24 *id.* at vii (editor's preface, explaining that this and later establishment acts were disallowed by the crown, until an act of March 16, 1702), 265 (Act of March 16, 1702).

146. *See infra* Part IV(C).

147. *See infra* Part IV(C).

148. 1809 Md. Laws ch. 167, confirmed by 1810 Md. Laws ch. 24. Amendments to the Constitution of 1776 may be found in 4 Swindler, *supra* note 25, at 384-92; 3 Thorpe, *supra* note 25, at 1701-12; CONSTITUTIONAL REVISION STUDY DOCUMENTS OF THE CONSTITUTIONAL CONVENTION COMMISSION OF MARYLAND 391-411 (Annapolis: State of Maryland, 1968) [hereinafter CONSTITUTIONAL REVISION STUDY DOCUMENTS]; ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 374-95 (1915) [hereinafter NILES].

149. 4 Swindler, *supra* note 25, at 374-75.

150. 4 *id.* at 395.

151. 4 *id.* at 367.

152. 4 *id.* at 376.

153. 1794 Md. Laws ch. 49, confirmed by 1795 Md. Laws ch. 11.

154. 1797 Md. Laws ch. 118, confirmed by 1798 Md. Laws ch. 83.

155. 1817 Md. Laws ch. 61, confirmed by 1818 Md. Laws ch. 163.

156. 4 Swindler, *supra* note 25, at 384.

157. 1824 Md. Laws ch. 205, confirmed by 1825 Md. Laws ch. 33.

158. 367 U.S. 488 (1961).

that a provision of the Maryland Constitution, requiring public office-holders to make a declaration of belief in the existence of God, was a violation of the right to free exercise of religion under the First and Fourteenth Amendments to the United States Constitution.]¹⁵⁹

Thus, religious toleration has been a powerful principle in Maryland's history.

IV. REVOLUTIONARY TIMES

A. *Association of the Freemen of Maryland (1775)—A Republican Form of Government and Part of a Union.*

The legal government of the Province of Maryland, until independence, was the proprietary government under the 1632 Charter (with the exception, as we have seen, of the period from about 1689–1716, when Maryland was a royal colony).¹⁶⁰ However, in the revolutionary era, 1774–1776, most of the functions of government in Maryland came to be exercised by provincial conventions elected by qualified voters.¹⁶¹ At one of these conventions of the province, held July 26 to August 14, 1775, the delegates unanimously adopted an "association" to be subscribed to by all the freemen of the province.¹⁶²

One commentator called the Association "the first [home-grown] written constitution of Maryland,"¹⁶³ because the Association established rudimentary forms of government for the province and the counties.¹⁶⁴ However, "constitution" is probably not an accurate description of the Association for a number of reasons. First, the document was called an "association," although the convention adopting it was familiar with the term "constitution."¹⁶⁵ Second, many of the governmental structures described by the Association had been in place for some time.¹⁶⁶

159. *Id.* at 495-96.

160. *See supra* note 104 and accompanying text.

161. *See* JOHN ARCHER SILVER, *THE PROVISIONAL GOVERNMENT OF MARYLAND (1774-1777)* 8-9, 13-14 (1895).

162. *PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS IN 1774, 1775, & 1776* at 17-36 (1836) [hereinafter *PROCEEDINGS*]. The numbering of these conventions seems to be problematical, because there were a total of nine sessions of six appointed or elected conventions. 1 *ARCHIVES OF MARYLAND NEW SERIES: AN HISTORICAL LIST OF PUBLIC OFFICIALS OF MARYLAND* 9, 17-18 (Edward C. Papenfuss ed., Maryland State Archives 1990).

163. CARL N. EVERSTINE, *THE GENERAL ASSEMBLY OF MARYLAND 1634-1776* at 533 (1980).

164. *Id.*

165. *PROCEEDINGS, supra* note 162, at 17. The term "constitution" would not be used until later in 1776. *See infra* Part IV(C).

166. *See PROCEEDINGS, supra* note 162, at 17-36.

As early as 1765, the colonies called a Stamp Act Congress in response to British abuses and in October, 1774 the first Continental Congress adopted a colonial "association" of non-intercourse with Britain, which was promptly agreed to by the convention of Maryland.¹⁶⁷ As early as June, 1774, provincial conventions were meeting in Maryland.¹⁶⁸ Local county conventions called the first of these provincial conventions, although local associations were formed as early as 1769 to bar imports from Britain.¹⁶⁹ Third, the Association was only provisional—it expressed hope for reconciliation with Britain.¹⁷⁰ Fourth, the Association, considered as a constitution, was only partial—it had no bill of rights and reserved some administrative, judicial, and taxing authority to agencies of the existing proprietary government.¹⁷¹

Although the Association probably cannot be called a constitution, the Association helped establish a republican form of government: one where the people elect representatives to exercise the powers of government.¹⁷² The Association itself, adopted by delegates from the counties to the provincial convention, was to be subscribed to by the freemen of the province.¹⁷³

The Association helped establish a republican form of government at three levels—province (state), county, and, to some extent, united colonies (country) levels. At the *provincial* level, the Association formalized the convention's exercise of governmental powers, principally military, finance, and aid in enforcement of the united colonies' commercial actions against Britain.¹⁷⁴ The Association provided for election of delegates to the convention by qualified voters in the counties.¹⁷⁵ The convention also elected a council of safety, chiefly to act when the convention was not in session.¹⁷⁶ At the *county* level, the Association vested in a committee of observation the powers of government: principally, enforcement of the subscription and commercial requirements of the Association, correspondence with other patriot groups, and help in financing defense, manufacturing, and relief.¹⁷⁷ The Association provided for election of members of

167. *Id.* at 6.

168. *See id.* at 3.

169. *See* BRUGGER, *supra* note 113, at 107-08.

170. PROCEEDINGS, *supra* note 162, at 18.

171. *See id.* at 18, 33-36.

172. *See id.* at 17, 29.

173. *See id.* at 17-18.

174. *See id.* at 18-19, 26.

175. *See id.* at 17-18.

176. *See id.* at 24-26.

177. *See id.* at 29-31.

each committee by the qualified voters in the county.¹⁷⁸ At the *united colonies* level, a provisional government had been established by the second Continental Congress.¹⁷⁹ The Association named delegates to represent the province in that Congress.¹⁸⁰

The Association firmly placed Maryland in the union of American colonies. The Association recited common complaints of all the colonies—British taxation of the colonists without the colonists' consent, as well as British retaliation against the Massachusetts Bay colony and other colonies.¹⁸¹ The Association also spoke of the colonies as being "united colonies" or "America," acting together through a "congress" in a "continental association" to limit exports to Britain.¹⁸² The second Continental Congress was acknowledged to have some authority within the province to enforce the anti-export agreement.¹⁸³ The Association was also willing to send Maryland "minute-men" into "neighboring colonies . . . for the preservation of American liberty[.]"¹⁸⁴ Finally, a significant part of the business of the Association was to select, instruct, and financially support delegates from Maryland to Congress.¹⁸⁵

Thus, the Association of Freemen of Maryland helped establish a republican form of government and placed Maryland in a union of American colonies.

B. Declaration (July 6, 1776)—Independence and Popular Sovereignty.

A Declaration of the Delegates of Maryland on July 6, 1776 was a product of a later revolutionary-era convention.¹⁸⁶ The Declaration proclaimed Maryland an independent state, based on sovereignty of the people.¹⁸⁷

Maryland's independence was in concert with the independence of the United States of America, proclaimed by the Declaration of

178. *Id.* at 29.

179. *See id.* at 12-17.

180. *Id.* at 36.

181. *See id.* at 17-18.

182. *See id.*

183. *See id.* at 18.

184. *Id.* at 19-20.

185. *See id.* at 36.

186. *Id.* at 201-03. Charles Carroll the Barrister has been credited with drafting Maryland's Declaration. 1 A BIOGRAPHICAL DICTIONARY OF THE MARYLAND LEGISLATURE, 1635-1789 at 195-96 (Edward C. Papenfuse et al. eds., 1979) [hereinafter A BIOGRAPHICAL DICTIONARY].

187. PROCEEDINGS, *supra* note 162, at 202-03.

Independence,¹⁸⁸ adopted by the second Continental Congress in Philadelphia on July 4, 1776.¹⁸⁹ Concerted action is clear both from the timing of the two proceedings and from the language of the two declarations.¹⁹⁰ Within a period of ten days the Maryland convention had: (i) instructed its delegates in Congress to vote for American independence (June 28);¹⁹¹ (ii) called for a new convention to establish a new government for the Province (July 3);¹⁹² and (iii) proclaimed Maryland an independent state (July 6).¹⁹³ The language of the Maryland Declaration referred about as often to general terms, like “the united colonies” and “these colonies,” as to local terms, like “the people of Maryland” and “this colony.”¹⁹⁴

Maryland’s Declaration and Congress’ Declaration of Independence were similar. Generally, both stated rights, identified grievances, noted that petitions for redress had been rejected, and declared freedom and independence.¹⁹⁵

However, the specifics differed. Maryland’s Declaration stated unalienable rights of exemption from Parliamentary taxation, regulation of Maryland’s own internal government, and life, liberty, and property;¹⁹⁶ the Declaration of Independence claimed equality, life, liberty, and the pursuit of happiness.¹⁹⁷ While Maryland’s Declaration stated grievances against both the British King and Parliament,¹⁹⁸ the Declaration of Independence claimed grievances almost entirely against the King.¹⁹⁹ While Maryland’s Declaration expressly stated the King had violated his compact with the people of Maryland,²⁰⁰ the Declaration of Independence only implicitly suggested a compact, *i.e.*, political bands or connections and allegiance to the King.²⁰¹ The Maryland Declaration’s observation, that a new convention had been called to establish a new government,²⁰² had no counterpart in the Declaration of Independence.

188. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

189. See HOMER CAREY HOCKETT, POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES, 1492-1852 at 208, 212, 219 (MacMillan Co. 1934) (1925).

190. Compare THE DECLARATION OF INDEPENDENCE (U.S. 1776) with A DECLARATION OF THE DELEGATES OF MARYLAND (Md. 1776).

191. See PROCEEDINGS, *supra* note 162, at 176.

192. See *id.* at 183-84.

193. See *id.* at 198, 202-03.

194. See *id.* at 202-03.

195. See *supra* note 190.

196. PROCEEDINGS, *supra* note 162, at 201-02.

197. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

198. PROCEEDINGS, *supra* note 162, at 201-02.

199. THE DECLARATION OF INDEPENDENCE paras. 3-29 (U.S. 1776).

200. PROCEEDINGS, *supra* note 162, at 202.

201. THE DECLARATION OF INDEPENDENCE paras. 1, 32 (U.S. 1776).

202. PROCEEDINGS, *supra* note 162, at 203.

Interestingly, the Maryland Declaration proclaimed independence from the British King and Parliament, not from the Proprietor.²⁰³ In view of Maryland's history, the absence of any reference to the Proprietor in the Declaration seems surprising. The King had granted the Proprietor extensive rights in the 1632 Charter of Maryland.²⁰⁴ The Proprietor and lower house of the Assembly had quarreled over their respective roles in making laws, the taxing and spending powers, and the Proprietor's power of appointing colonial officials.²⁰⁵

The most notable recent quarrel had been over the proprietary Governor Robert Eden's fee proclamation of November 26, 1770,²⁰⁶ establishing, without the consent of the Assembly, the fees of public officers.²⁰⁷ At its next session, the lower house unanimously passed resolutions that the fee proclamation was illegal, arbitrary, unconstitutional, and oppressive, and that the Assembly had the sole right to impose taxes or fees.²⁰⁸ The fees issue was later debated in the newspaper, *Maryland Gazette*, by Daniel Dulany, the younger, for the Governor and Proprietor, and by Charles Carroll of Carrollton, for the popular or legislative party.²⁰⁹

There is an explanation for why the Maryland Declaration proclaimed independence from Britain, not from the Proprietor. By July 6, 1776, the government of the Proprietor had already been largely replaced by a popular government of the province.²¹⁰ Consider the following chronology. On April 19, 1774, Governor Eden, the last proprietary governor, prorogued the provincial General Assembly.²¹¹ That was the assembly's last meeting. That June, the first revolutionary-era Convention of Maryland met, protesting British actions against Boston and the Massachusetts Bay colony, proposing a non-exportation, non-importation, and non-intercourse association against British trade, and appointing deputies to the first Continental Congress.²¹² That December, the Convention of Maryland recommended forming a militia, to be supported by the counties.²¹³ As we have seen, in July, 1775, the

203. See PROCEEDINGS, *supra* note 162, at 202-03.

204. See *supra* Part III(A).

205. See 63 ARCH. MD., *supra* note 82, at 114.

206. See 63 *id.*

207. See 63 *id.*

208. See 63 *id.* ("Resolves of this [Lower] House" (Oct. 18, 1771)).

209. MARYLAND AND THE EMPIRE, 1773: THE ANTILON-FIRST CITIZEN LETTERS 14-17 (Peter S. Onuf ed., 1974).

210. DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 1-2 (2006).

211. 64 ARCH. MD., *supra* note 82, at 360-61.

212. PROCEEDINGS, *supra* note 162, at 3-5.

213. *Id.* at 88-89.

Convention of Maryland, pursuant to the "Association," provided many rudimentary governmental functions for the province and its counties, while reserving some administrative, judicial, and taxing authority to the proprietary government.²¹⁴ On May 24, 1776, the Convention of Maryland instructed Governor Eden to leave the province, while recognizing that the Governor's powers would be assumed by the president of the Governor's Council.²¹⁵ In late June, Governor Eden left Maryland.²¹⁶ On July 3, the Convention of Maryland called for the election of a new convention to form a new government.²¹⁷ Thus, before July 6, 1776, the date of Maryland's Declaration, the government of the Proprietor was largely replaced.

In addition to proclaiming Maryland's independence, the Declaration established popular sovereignty, that is, government by authority of the people.²¹⁸ We have already seen many of the steps in the transition from sovereignty of the Proprietor and the British Crown under the 1632 Charter of Maryland to sovereignty of the people.²¹⁹ The 1632 Charter itself provided for a measure of representative self-government through an assembly of freemen.²²⁰ Then, during revolutionary times, most of the functions of government were in fact exercised by popularly-elected conventions and their agencies.²²¹ However, almost until the Maryland Declaration, the conventions denied that the authority of the Crown was being totally suppressed²²² and that all the powers of government were being exercised under authority of the people.²²³ On July 3, 1776, the convention finally resolved that, "a new convention be elected for the express purpose of forming a new government, by the authority of the people only"²²⁴

The language of the Maryland Declaration of July 6, 1776 clearly recognized the sovereignty of the people.²²⁵ The Declaration claimed that regulation of Maryland's internal government was the inherent, unalienable, and exclusive right of

214. *Id.* at 17-36; *see also supra* Part IV(A).

215. PROCEEDINGS, *supra* note 162, at 151.

216. *Id.* at 168-69.

217. *Id.* at 184.

218. *Id.* at 202-03.

219. *See supra* Parts III(A)-IV(A).

220. 4 Swindler, *supra* note 25, at 360-61. *See supra* Part III(A).

221. *See* PROCEEDINGS, *supra* note 162, at 17-36.

222. *See, e.g.,* PROCEEDINGS, *supra* note 162, at 11.

223. *See, e.g., id.* at 184; *cf. id.* at 141 (May 21, 1776 negative response of the convention to the May 10, 1776, resolution of Congress, recommending that each of the colonies adopt a new government).

224. *Id.* at 184.

225. *Id.* at 201-03.

the people of Maryland.²²⁶ The right of Britain to govern the externals, based on the consent of the people of the colonies, ended with the King's violation of his compact with the people.²²⁷ A new confederation of the independent states, by authority of the people (or their delegates) through their deputies in Congress, would be established to govern those externals.²²⁸

Of course, the Maryland Declaration only established the principle that sovereignty was in the people, not in the Proprietor or Crown. The definition of "the people" who were sovereign was a very limited one. At least as measured by the qualifications for voting and holding office, "the people" included only free, white, adult, males who owned property.²²⁹ As we shall see, the definition of "the people," entitled to participate in their government, was later broadened considerably.²³⁰

Thus, the Maryland Declaration proclaimed Maryland a free and independent state based on sovereignty of the people.

C. Constitution of 1776—A Constitution of the People with a Declaration of Rights and the Separation of Powers.

Maryland's first real, home-grown constitution, that of 1776, was a written constitution of the people with specified rights and separated powers of government.²³¹ That constitution also provided for the continuation of many basic governmental institutions and laws.²³²

The Constitution of 1776 was created as a constitution of the people. We have already traced some of the steps leading to the formation of the constitution. On May 10, 1776, the Continental Congress, authorizing independence, recommended that the colonies each adopt a new government.²³³ On June 28, 1776, the

226. *Id.* at 202-03.

227. *Id.* at 202.

228. *Id.* at 203.

229. The extent of popular sovereignty in Maryland before and immediately after the revolution is discussed in SKAGGS, *supra* note 65, at 201-02.

230. *See infra* Part V(B).

231. THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (Edward C. Papenfuse & Gregory A. Stiverson eds., 1977) [hereinafter THE DECISIVE BLOW IS STRUCK] (The entry of November 3, 1776 contains the adopted version of the Declaration of Rights. The entry of November 8, 1776 contains the adopted version of the Constitution and Form of Government); *see also* PROCEEDINGS, *supra* note 162, at 311-13, 349-65; Perry, *supra* note 25, at 346-48; 4 Swindler, *supra* note 25, at 372-84; CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 148, at 369-87; NILES, *supra* note 148, at 354-74; 3 Thorpe, *supra* note 25, at 1686-1701.

232. *See generally* 4 Swindler, *supra* note 25, at 376-83.

233. *See* PROCEEDINGS, *supra* note 162, at 140-41.

Maryland convention instructed its delegates to vote for American independence.²³⁴ On July 3, 1776, that convention resolved that “a new convention be elected for the express purpose of forming a new government, by the authority of the people only”²³⁵ On July 6, 1776, the convention proclaimed Maryland an independent state.²³⁶

The Constitution of 1776 was adopted after due deliberation by a sort of constitutional convention. After the convention’s election in early August, 1776, this last of the revolutionary-era conventions met on August 14.²³⁷ As we have seen, the convention was “elected for the express purpose of forming a new government”²³⁸ (However, the convention continued to exercise general governmental powers—military, financial, and commercial). On August 17, the convention elected a committee “to prepare a declaration and charter of rights, and a plan of government . . . of this state”²³⁹ The committee was composed of Matthew Tilghman, Charles Carroll the Barrister, William Paca, Charles Carroll of Carrollton, George Plater, Samuel Chase, and Robert Goldsborough.²⁴⁰ On August 27, the committee presented a draft declaration of rights to the convention.²⁴¹ The same day, Carroll the Barrister and Samuel Chase, expressing their unwillingness to follow instructions from a radical democratic group of their constituents, resigned from the convention.²⁴² Several days later the convention elected Thomas Johnson and Robert T. Hooe to the committee drafting the constitution.²⁴³ On September 10, the committee presented a draft form of government to the convention.²⁴⁴ The next day, the convention postponed consideration of the constitution until September 30.²⁴⁵ In the interim, the state’s delegates were sent to Congress and the convention voted that the constitution be printed for distribution to the public.²⁴⁶ The convention considered the

234. *Id.* at 175-76.

235. *Id.* at 183-84.

236. *Id.* at 198, 203.

237. *Id.* at 207.

238. *See supra* note 217 and accompanying text.

239. PROCEEDINGS, *supra* note 162, at 219-20.

240. *Id.* at 222.

241. *See id.* at 228; *see also* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L. J. 929, 937-38 n.28 (2002) (discussing differing views of who authored the draft, *i.e.*, Charles Carroll the Barrister or Charles Carroll of Carrollton and Samuel Chase).

242. PROCEEDINGS, *supra* note 162, at 228.

243. *Id.* at 233.

244. *Id.* at 248, 251.

245. *Id.* at 251.

246. *Id.* at 258.

declaration of rights and form of government for almost a month, beginning October 10, first by a committee of the whole and then by the convention.²⁴⁷ The convention agreed to the Declaration of Rights on November 3 and to the Form of Government on November 8.²⁴⁸ The committee, drafting the constitution, was made up of notable people. Most of the members of the committee had legal training.²⁴⁹ Carroll of Carrollton had been the popular protagonist, opposing Governor Eden's fee proclamation of 1770, which had been issued without consent of the Assembly.²⁵⁰ All members of the committee (except Hooe) served, at some time, as delegates to the Continental Congress.²⁵¹ Three members of the committee—Carroll of Carrollton, Chase, and Paca—were signers of the Declaration of Independence of the United States.²⁵² Three members of the committee—Johnson, Paca, and Plater—later served as Governors of Maryland.²⁵³ Carroll of Carrollton subsequently was a United States Senator.²⁵⁴ Two members of the committee—Chase and Johnson—became Associate Justices of the United States Supreme Court.²⁵⁵ “Tilghman has been referred to as the ‘Father of the Revolution’ in Maryland” for his work as elected president of the convention that adopted the constitution, as well as president of most of the other revolutionary-era conventions.²⁵⁶ Hooe was an unsuccessful movant, with William Marbury and others, in *Marbury v. Madison*²⁵⁷ for an original writ of mandamus from the United States Supreme Court to order James Madison, Secretary of State, to deliver to the movants their commissions as justices of the peace in the District of Columbia.²⁵⁸

The Constitution of 1776 was the result of political debate and compromise. When Maryland was a province, the main political division was between the proprietary, or “court” party, and the anti-proprietary, or “country” party.²⁵⁹ Closer to independence, members of the proprietary faction became known as “loyalists” and the anti-proprietary faction became known as the “popular” party.²⁶⁰ After the Association of Freemen in 1775, loyalists were

247. *Id.* at 275, 295.

248. *Id.* at 310, 349.

249. *See generally* 1, 2 A BIOGRAPHICAL DICTIONARY, *supra* note 186 (details respective biographies of each committee member).

250. 1 *id.* at 197-98.

251. 1 *id.* at 196, 198, 215, 362; 2 *id.* at 496, 634, 652, 827.

252. 1 *id.* at 198, 216; 2 *id.* at 634.

253. 2 *id.* at 496, 634, 652.

254. 1 *id.* at 198.

255. 1 *id.* at 215; 2 *id.* at 496.

256. 2 *id.* at 826-27.

257. 5 U.S. 137 (1803).

258. *See infra* Part V(A); *Marbury*, 5 U.S. at 137-38.

259. SKAGGS, *supra* note 65, at 92-93, 105-06.

260. *See id.* at 129-32, 145-47.

disfranchised in voting for members of the convention.²⁶¹ The popular party had a majority at the convention, was conservative, and controlled the committee drafting the constitution.²⁶² A minority at the convention was radical and democratic.²⁶³ The democrats wanted direct election of most state and local government officials, annual elections, universal enfranchisement of resident freemen over age 21, and land taxes rather than poll (capitation or head) taxes.²⁶⁴ The democratic program, based on the Resolves of the Anne Arundel Militia and put in the form of instructions by a large number of the freemen of Anne Arundel County to the County's delegation to the convention, caused Carroll the Barrister and Samuel Chase to resign their seats on August 27, 1776.²⁶⁵ Although Chase was reelected on September 10, 1776, Carroll the Barrister was not.²⁶⁶ The conservatives favored direct elections of fewer officials, longer terms of office, centralized government, and substantial property qualifications for voters and for officeholders.²⁶⁷ The compromise reached by the convention generally reflected the conservatives' program.²⁶⁸ However, the democratic influence can be seen in the abolition of the poll tax in favor of an apportioned property tax, annual elections of members of the lower house, and a reduction in the property qualifications for voters.²⁶⁹

The Constitution of 1776 had the *name* of a typical constitution. In this respect, Maryland may be compared with its "sister states," adjacent states that also adopted constitutions in 1776—Virginia (June), Pennsylvania (July), and Delaware (September).²⁷⁰ During the colonial period, the fundamental law of Great Britain, including the Magna Carta and other statements of rights, as well

261. See *id.* at 147.

262. *Id.* at 188-91.

263. *Id.* at 187.

264. *Id.* at 184, 188-89, 220-21, 223-24, 226-28.

265. See *supra* note 242 and accompanying text.

266. PROCEEDINGS, *supra* note 162, at 248.

267. SKAGGS, *supra* note 65, at 190-95.

268. *Id.* at 192-95.

269. *Id.* at 191, 193-95.

270. See Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 644, nn.99, 102, 104 (1998) [hereinafter *Maryland Declaration of Rights*] (Virginia, Pennsylvania, Maryland, and Delaware can be considered "sister states" with regard to their declarations or bills of rights); cf. 2 Swindler, *supra* note 25, at 204 (many provisions of the Delaware, Maryland, and Pennsylvania constitutions, particularly provisions of the bills of rights, have identical language). The constitutions of Maryland's "sister-states" are set out in: 2 Swindler, *supra* note 25, at 197-204 (Delaware); 8 Swindler, *supra* note 25, at 277-85 (Pennsylvania); 10 Swindler, *supra* note 25, at 48-56 (Virginia). See also 1 Thorpe, *supra* note 25, at 562-68 (Delaware); 5 Thorpe, *supra* note 25, at 3081-92 (Pennsylvania); 7 Thorpe, *supra* note 25, at 3812-19 (Virginia).

as the Charter of Maryland, were often referred to in the province as "constitutions."²⁷¹ The new states, including Maryland, adopted foundation documents and called them "constitutions."²⁷²

The Constitution of 1776 also had the *parts* of a typical constitution. The Maryland Constitution included a Preamble, a Declaration of Rights, and a Form of Government.²⁷³ By comparison, Virginia's constitutional documents included a preamble, a "Bill of Rights," another preamble, and a "Constitution or Form of Government;" Pennsylvania had a preamble, a "Declaration of Rights," and a "Plan or Frame of Government;" Delaware a "Declaration of Rights and Fundamental Rules" and a "Constitution or System of Government."²⁷⁴

The contents of the Maryland Constitution of 1776 were somewhat typical of revolutionary-era constitutions. The *Preamble* recited the provocative acts of Great Britain, the independence of the American colonies under governments by the authority of the people, and the purpose of the constitution—to provide a sure foundation and permanent security for the state.²⁷⁵

In most respects, the *Declaration of Rights* was typical of revolutionary-era constitutions. The Declaration of Rights set forth general principles of government and specified the rights of the people of Maryland.²⁷⁶ Many of those general principles have endured, being included in later Maryland constitutions of 1851,²⁷⁷ 1864, and 1867.²⁷⁸ First, popular sovereignty was pronounced in Article 1 (government originates from the people, is founded on compact, that is, with their consent and for their good), Article 2 (the people's sole right to regulate their internal government), and Article 4 (the people's right to reform or recreate their government).²⁷⁹ Second, applicable law was recited in Article 3 (the common law and statutes of England and acts of the provincial General Assembly continue in force).²⁸⁰ Third, representative

271. See *supra* Part III(A).

272. See 4 Swindler, *supra* note 25, at 372-84.

273. See 4 *id.* at 372-84.

274. See 2 *id.* at 197-204 (Delaware); 8 *id.* at 277-85 (Pennsylvania); 10 *id.* at 48-56 (Virginia). See also 1 Thorpe, *supra* note 25, at 562-68 (Delaware); 5 *id.* at 3081-92 (Pennsylvania); 7 *id.* at 3812-19 (Virginia).

275. See 4 Swindler, *supra* note 25, at 372.

276. 4 *id.* at 372-75.

277. See *infra* Part V(D).

278. The Constitution of 1864 is set forth in 4 Swindler, *supra* note 25, at 417-46; CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 148, at 445-83; NILES, *supra* note 148, at 430-73; 3 Thorpe, *supra* note 25, at 1741-79. The Constitution of 1867 is set out in 4 Swindler, *supra* note 25, at 448-79; CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 148, at 511-53; NILES, *supra* note 148, at 474-522; 3 Thorpe, *supra* note 25, at 1779-1826.

279. 4 Swindler, *supra* note 25, at 372.

280. 4 *id.* at 372.

government was declared in Article 4 (government officials are trustees, accountable to the public) and Article 5 (the people's right to participate in the legislature; free and frequent elections).²⁸¹ Fourth, separation and allocation of powers was observed in Article 6 (separation of legislative, executive, and judicial powers), Article 7 (suspension of laws only by the legislature), Article 12 (no taxation without consent of the legislature), Article 26 (no standing army without consent of the legislature), Article 28 (quartering of soldiers in wartime only as the legislature directs), and Article 30 (independent judiciary, serving during good behavior, removable for misbehavior only by conviction in court or by the governor after address of the general assembly; judges not to hold other office or receive other fees).²⁸² Fifth, legislative matters were described in Article 8 (speech and debate privilege), Article 9 (fixed meeting place), and Article 10 (frequent convening).²⁸³ Sixth, limitations on criminal laws were set out in Article 14 (no laws inflicting sanguinary, that is, bloody or cruel and unusual penalties).²⁸⁴ Seventh, military matters were marshaled in Article 25 (defense by the militia), Article 26 (disapproval of standing armies, except with consent of the legislature), Article 27 (civilian control of the military), and Article 28 (disapproval of quartering of soldiers).²⁸⁵ Eighth, limits on office-holding were observed in Article 31 (rotation in executive offices) and Article 32 (one office at a time; no unauthorized gifts from foreign nations, the United States, or other states).²⁸⁶ Ninth, oaths were recited in Article 35 (public officers' oath) and Article 36 (oath or affirmation administered sensitively to religious beliefs).²⁸⁷ Tenth, fundamental law was declared in Article 42 (constitutional change by the legislature only as prescribed in the constitution).²⁸⁸

Many of the specified rights of the people in the Declaration of Rights have also endured in later constitutions. First, jury trial was preserved in Article 3, Article 19 (criminal prosecutions), and Article 21.²⁸⁹ Second, property rights were saved by Article 3 (grants under the Charter of Maryland).²⁹⁰ Third, free expression was preserved in Article 11 (petition the legislature) and Article 38

281. 4 *id.* at 372-73.

282. 4 *id.* at 373-74.

283. 4 *id.* at 373.

284. 4 *id.*

285. 4 *id.* at 374.

286. 4 *id.*

287. 4 *id.* at 375.

288. 4 *id.*

289. 4 *id.* at 372-73.

290. 4 *id.* at 372.

(press).²⁹¹ Fourth, certain taxes were prohibited by Article 13 (poll, that is, capitation or head taxes; taxes on paupers; unapportioned property taxes).²⁹² Fifth, ex post facto laws (retrospective criminal laws) were checked by Article 15.²⁹³ Sixth, bills of attainder (legislative determinations of treason or felony) were judged improper by Article 16.²⁹⁴ Seventh, legal remedies were given in Article 17 (speedy judicial remedies for wrongs to person or property).²⁹⁵ Eighth, criminal procedural rights were claimed in Article 18 (local venue), Article 19 (written notice of charges, counsel, confrontation, compulsory process, examination and cross-examination on oath, speedy trial, impartial and unanimous jury), Article 20 (no compulsory self-incrimination), Article 22 (no excessive bail or fines; no cruel or unusual punishment), Article 23 (search warrants only under oath or affirmation; no general warrants), and Article 24 (no forfeiture of property).²⁹⁶ Ninth, due process was observed in Article 21 (no deprivation of life, liberty, or property but by the judgment of peers or by the law of the land).²⁹⁷ Tenth, the military was limited by Article 28 (no quartering of soldiers in homes in peacetime without the owner's consent) and Article 29 (no martial law punishment of civilians).²⁹⁸ Eleventh, religious rights were enshrined in Article 33 (free religious practice), Article 35 (no religious test for public office), and Article 36 (affirmation, instead of oath, permitted).²⁹⁹ Twelfth, monopolies were barred by Article 39.³⁰⁰

In certain respects, the Declaration of Rights was atypical of revolutionary-era constitutions. First, the Declaration included more detail than the constitutions of Maryland's sister states.³⁰¹ In part, that greater detail was due to inclusion of matters complementing the frame of government, *e.g.*, the general principles (above) describing the separation and allocation of powers, legislative matters, the military, and limits on office-

291. 4 *id.* at 373-75.

292. 4 *id.* at 373.

293. 4 *id.*

294. 4 *id.*

295. 4 *id.*

296. 4 *id.* at 373-74.

297. 4 *id.* at 373.

298. 4 *id.* at 374.

299. 4 *id.* at 374-75. Article 35 had an exception allowing the government to require public officers to declare their belief in the Christian religion. [That exception would now be invalid under the United States Constitution. *Cf. Torcaso v. Watkins*, 367 U.S. 488 (1961) (declaration of belief in the existence of God, as a test for public office in Maryland, held unconstitutional).] See *supra* notes 158-59 and accompanying text.

300. 4 Swindler, *supra* note 25, at 375.

301. See, *e.g.*, *supra* notes 270, 274 and accompanying text.

holding.³⁰² In part, that greater detail also resulted from the incorporation of some significant “firsts” in American state constitutions. Those “firsts” were Article 8 (speech and debate privilege), Article 13 (no poll taxes, no taxes on paupers), Article 16 (no bills of attainder), Article 29 (no martial law punishment of civilians), Article 39 (no monopolies).³⁰³ Maryland’s Declaration of Rights, in draft form a model for Delaware’s Declaration of Rights, may also deserve some credit for a Delaware “first.” The model for Delaware’s “first” was Article 28 (no quartering of soldiers in homes in peacetime without the owner’s consent).³⁰⁴ The prohibitions in Article 15 of ex post facto laws (Maryland first used the term “ex post facto”),³⁰⁵ in Article 16 of bills of attainder, and in Article 40 of grants of titles of nobility were likely models for similar prohibitions in Article I, sections 9 (limit on Congress) and 10 (limit on the states) of the United States Constitution.³⁰⁶ The limitation in Article 28 on quartering of soldiers was likely a model for the corresponding limitation in the Third Amendment to the United States Constitution.³⁰⁷

Second, the Maryland Declaration of Rights was in some respects atypical, because it was missing some important rights protected by one or more of the sister-state declarations of rights—anti-establishment of religion (Delaware §2),³⁰⁸ speech (of the people, not just legislators) (Pennsylvania Article XII),³⁰⁹ assembly (Pennsylvania Article XVI),³¹⁰ bear arms (Pennsylvania Article XIII,³¹¹ Virginia §13³¹²), equality (Virginia §1,³¹³ Pennsylvania Article I,³¹⁴ Delaware §3³¹⁵). The Maryland Declaration of Rights was also silent on slavery and the slave trade (the latter prohibited by Article 26 of the Delaware Constitution or System of Government).³¹⁶

302. 4 Swindler, *supra* note 25, at 372-74.

303. Friedman, *supra* note 241, at 1015-25; 1 BILL OF RIGHTS, *supra* note 80, at 279; ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 at 59 (1962).

304. See 1 BILL OF RIGHTS, *supra* note 80, at 276; 2 *id.* at 1204 (indicating Delaware was first); cf. Friedman, *supra* note 241, at 940-47 (arguing Maryland was first).

305. 1 BILL OF RIGHTS, *supra* note 80, at 279.

306. Perry, *supra* note 25, at 332-37, 342-45.

307. See 1 BILL OF RIGHTS, *supra* note 80, at 276.

308. 2 Swindler, *supra* note 25, at 197.

309. 8 *id.* at 279.

310. 8 *id.* at 279.

311. 8 *id.* at 279.

312. 10 *id.* at 50.

313. 10 *id.* at 49.

314. 8 *id.* at 278.

315. 2 *id.* at 197.

316. *Maryland Declaration of Rights*, *supra* note 270, at 672. A committee proposal to prohibit importation of slaves was defeated in the Maryland convention’s committee of the whole. *Id.* at 707 n.546.

The Form of Government of the Maryland Constitution of 1776 was also typical of revolutionary-era constitutions in many respects. The government continued many of the institutions of the provincial government—a General Assembly with two houses (Article 1), counties (e.g., Articles 2, 3), a Governor (Article 25) and Council (Article 26), and courts (Articles 40, 48, 56).³¹⁷ The Form of Government, like other revolutionary-era constitutions, applied the principle of popular sovereignty—the people elected their legislature (the House of Delegates directly, Articles 2–5, the Senate indirectly, Articles 14–18).³¹⁸ The legislature, like the revolutionary-era conventions, was the supreme institution of government.³¹⁹

Apparently, following John Adams' ideas,³²⁰ the Form of Government gave the two houses joint power to elect the Governor and Council.³²¹ The Governor, with the advice and consent of the Council, appointed most other state officers.³²²

The Form of Government, following that of Virginia, applied the separation of powers principle.³²³ Both the proprietary government and the revolutionary-era conventions had intermixed the functions of government. Under the Proprietor, the Governor served in both executive and judicial capacities and often controlled members of the House of Delegates; the Council had executive, legislative, and judicial roles.³²⁴ During the revolutionary era, the conventions acted as both legislature and executive (although, eventually, the conventions elected a Council of Safety as an additional executive body).³²⁵ To be sure, the Form of Government did intermix the selection of officials of the three branches; the legislature elected the executives and the executives appointed the judges.³²⁶ However, the operation of the three branches was largely separate—generally, officers of one

317. 4 Swindler, *supra* note 25, at 376-83.

318. 4 *id.* at 376-78.

319. 4 *id.* at 376-83.

320. Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), letter from John Adams to George Wythe (Jan. 1776) in 4 THE WORKS OF JOHN ADAMS 185-200 (Charles Francis Adams ed., Books for Libraries Press 1969) (1850). See also M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 53-55, 63, 220 (1994) (discussing the influence of Adams on the early constitutions of Maryland and other states).

321. 4 Swindler, *supra* note 25, at 379 (see Form of Government Articles 25 and 26).

322. 4 *id.* at 382 (see Form of Government Article 48).

323. 4 *id.* at 373 (see Declaration of Rights Article 6).

324. See *supra* Parts III(A)–(B).

325. See *supra* Part IV(A).

326. 4 Swindler, *supra* note 25, at 379, 382 (see Form of Government Articles 25 and 48).

branch were forbidden to hold offices, or to profit from those offices, in another branch.³²⁷

The Form of Government also included notions of mixed government, checks, and balances. The English government “mixed” monarchical (the King or Queen), aristocratic (House of Lords), and democratic (House of Commons) forms. In the Province of Maryland, the institutions representing those forms were, respectively, Proprietor, Council, and House of Delegates.³²⁸ Some trace of those forms continued in the qualifications of office in the Form of Government—the Governor’s qualifications included property in the state worth more than 5,000 pounds; the Council member’s and the Senator’s, property worth more than 1,000 pounds; and the Delegate’s, property worth more than 500 pounds.³²⁹ These property qualifications for office holding were very restrictive, and atypical of revolutionary-era constitutions.

There were some typical checks by each branch on the others. Within the General Assembly, the two houses checked each other because the approval of both was needed to enact legislation.³³⁰ Only the House of Delegates could originate money bills.³³¹ The House of Delegates, as the grand inquest of the state and the holder of related powers, also had a check on the other branches of government.³³² Within the executive branch, the Governor and Council checked each other, because the concurrence of both was needed for action, such as the appointment of government officers.³³³ The Governor could check the courts by granting reprieves or pardons for crime.³³⁴ However, the Governor did not have the power to veto legislation.³³⁵ The judiciary was checked by the Governor’s power to remove judges on the address of the legislature, two-thirds of the members of each house concurring.³³⁶

The principle “balance” of the Form of Government was to provide some measure of independence for judges: a term of office during good behavior.³³⁷ As under other revolutionary-era constitutions, the executive—being plural, appointed annually by

327. 4 *id.* at 374, 380-82 (see Declaration of Rights Articles 30, 32 and Form of Government Articles 37-38, 45, 53).

328. See *supra* Part III(A).

329. 4 Swindler, *supra* note 25, at 376, 378-79 (see Form of Government Articles 30, 26, 15 and 2, respectively).

330. 4 *id.* at 377-78 (see Form of Government Articles 11 and 22).

331. 4 *id.* at 377 (see Form of Government Article 10).

332. 4 *id.* (see Form of Government Article 10).

333. 4 *id.* at 382 (see Form of Government Articles 48-49).

334. 4 *id.* at 380 (see Form of Government Article 33).

335. See 4 *id.* at 376-83.

336. 4 *id.* at 374 (see Declaration of Rights Article 30).

337. 4 *id.* at 374, 381 (see Declaration of Rights Article 30 and Form of Government Article 40).

the legislature, subject to term limits, stripped of English prerogatives, and without the veto—was weak.³³⁸ Another kind of balance, geographical and unique to Maryland, was the allocation of offices between the western and eastern shores.³³⁹

The Form of Government was also typical in continuing a property qualification for voters, who had to be free men above 21 years of age and, generally, owners of 50 acres of land or property worth 30 pounds.³⁴⁰ Notwithstanding popular sovereignty, the arguments for property qualifications for voting were that owning property (i) gave voters a stake in the community; (ii) assured that voters had an independent will, free from corruption; (iii) provided fairness by subjecting to taxes those responsible for levying them and by giving those who owned taxable property a say in how it was used; and (iv) reflected the idea that wealth was a sign of virtue.³⁴¹ The continuation of *viva voce* (voice) voting, rather than a secret ballot, may also have restricted free voting.³⁴² However, discrimination against Catholics and other Christian minorities in voting, and holding office, was removed.³⁴³ Like most other early state constitutions, the Maryland Form of Government generally lacked any provision for apportioning representatives based on population. Rather, four delegates were allocated to each county and two each to the cities of Annapolis and Baltimore.³⁴⁴ The Form of Government was also typical in providing for elections of few local officials, only sheriffs.³⁴⁵

The aspects of the Form of Government, enduring in later constitutions, have been a bicameral legislature, a governor, an independent judiciary, the separation of powers, and some rudimentary checks and balances.³⁴⁶ The Form of Government also provided a model in certain respects for the Constitution of the United States. The indirect mode of electing members of the Maryland Senate, their long terms of office, and their independence were a pattern for the United States Senate.³⁴⁷ The

338. 4 *id.* at 379-80 (see Form of Government Articles 25-26, 31 and 33).

339. 4 *id.* at 377-78, 382-83 (see respectively, Article 13 (pertaining to treasurers), Articles 15-16 (relating to senators), Article 51 (dealing with registers of the land office), and Article 56 (applying to sittings of the General Court)).

340. 4 *id.* at 376 (see Form of Government Article 2).

341. See SKAGGS, *supra* note 65, at 18-20, 104, 179-96, 202; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* at 168-69 (1969).

342. 4 Swindler, *supra* note 25, at 376-78 (see Form of Government Articles 2, 4-5, and 14).

343. 4 *id.* at 374-75, 381, 383 (see Declaration of Rights Articles 33 and 35-36 and Form of Government Articles 43 and 55).

344. 4 *id.* at 376 (see Articles 2 and 4-5).

345. 4 *id.* at 381 (see Article 42).

346. See *infra* Parts V(A), V(D).

347. See *THE FEDERALIST* NO. 39, 191-92 (James Madison), No. 63, 321-22 (Alexander Hamilton or James Madison) (J.M. Dent & Sons Ltd. 1961).

indirect means of choosing Maryland Senators by electors may also have been a model for choosing the United States President, although the Maryland electors met altogether and the Presidential electors meet by state.³⁴⁸ The independent judiciaries of Maryland, and a number of other states, were examples for the independent judiciary of the United States.³⁴⁹

The Constitution of 1776 had the status of fundamental law. This is suggested by its nature. Unlike the unwritten British constitution, the Constitution of 1776 was written, fixed, definite, and not readily changeable by the government.³⁵⁰ Unlike the Charter of Maryland, written in Latin, the constitution was written in English, the common language of the people, who could know what the constitution meant and how it limited their government.³⁵¹ The fundamentality of the constitution was implied by the language, "constitution," used in the Declaration of Rights and the Form of Government.³⁵² The status of the Constitution of 1776 as fundamental law can be seen as the culmination of the efforts of Marylanders throughout the province's history.³⁵³ Particular provisions of the Constitution of 1776 even made clear that it had the status of fundamental law. First, the compact of the people to form a government was the constitution, created by the delegates to the convention.³⁵⁴ The officers of government were declared trustees for the people.³⁵⁵ Presumably, they were trustees of the trust created by that compact or constitution. Second, generally, Article 21 of the Declaration of Rights, echoing the Magna Carta, provided that government ought not deprive any freeman of his life, liberty, or property without due process of law.³⁵⁶ Third, specifically, the constitution advised all three branches of government of the constitution's fundamentality. Article 42 of the Declaration of Rights admonished the *legislature*

348. See 4 Swindler, *supra* note 25, at 392.

349. See THE FEDERALIST No. 81, 525 (Alexander Hamilton) (J.M. Dent & Sons Ltd. 1961).

350. See *supra* Part II (explaining the importance of written constitutions).

351. See *supra* Part III(A); see 4 Swindler, *supra* note 25, at 372.

352. See 4 Swindler, *supra* note 25, at 372.

353. See *supra* Parts III(A)–IV(B) (describing the interpretation of the Charter of Maryland as establishing a higher law, limiting the Proprietor, and saving for the colonists the rights of Englishmen; the establishment by the General Assembly of a rudimentary bill of rights by statute in the "Act ordeining certain Laws for the Government of this Province" in 1639; the specification of the rights of the colonists as Englishmen by Daniel Dulany, the elder, in 1728; and the resolves of the House of Delegates in 1765, stating the rights of the colonists against Great Britain).

354. 4 Swindler, *supra* note 25, at 372 (see Declaration of Rights Article 1 and the Preamble).

355. 4 *id.* at 372 (see Declaration of Rights Article 4).

356. 4 *id.* at 373; see Perry, *supra* note 25, at 5-7 (explaining how "due process" evolved from the actual words, "by the law of the land").

not to change the constitution, except as provided by the constitution itself.³⁵⁷ The Form of Government strictly limited the power of the *executive*, which included the Governor and the Council. Article 33 of the Form of Government expressly restricted the Governor from exercising “any power or p[r]erogative” under English law or custom.³⁵⁸ Article 3 of the Declaration of Rights instructed the *judiciary* about what law to apply—the common law and statutes of England, acts of the provincial General Assembly, acts of the (revolutionary-era) conventions, and the constitution itself.³⁵⁹ In addition, the independence of the judiciary, the branch traditionally charged with determining the law, suggests the fundamentality of the constitution.³⁶⁰

Of course, the Constitution of 1776 was lacking certain other provisions that would have made it even clearer that the constitution had the status of fundamental law. First, while there was an oath of office, the oath was to support the state, not expressly to support the constitution.³⁶¹ Second, while the convention paused for several weeks for the proposed constitution to be printed and distributed to the public, the constitution was not submitted to the voters for ratification.³⁶² Third, there was no provision in the constitution for review of acts of government officials by a Council of Censors,³⁶³ by a council of revision,³⁶⁴ or by judges.³⁶⁵

Thus, Maryland’s first real, home-grown constitution, that of 1776, provided a written constitution of the people with specified rights and separated powers of government. That constitution also provided for the continuation of the basic institutions of government—a bicameral legislature, counties, a Governor and Council, and courts. Furthermore, the Constitution of 1776

357. 4 Swindler, *supra* note 25, at 375. Article 59 of the Form of Government limited the changes to those passed by the General Assembly, published at least three months before a new election, and then confirmed by the General Assembly after that election and Articles 2, 4, and 5 of the Form of Government provided for annual elections of the House of Delegates. 4 *id.* at 376, 383.

358. 4 *id.* at 380.

359. 4 *id.* at 372.

360. See 4 *id.* at 374, 381 (Article 30 of the Declaration of Rights and Article 40 of the Form of Government provided judges tenure during good behavior, rather than at the whim of the executive, and Article 30 recommended that judges’ salaries be liberal).

361. 4 *id.* at 375 (see Declaration of Rights Article 35).

362. PROCEEDINGS, *supra* note 162, at 377-78.

363. 8 Swindler, *supra* note 25, at 285 (see Section 47 of the Plan or Frame of Government of the Pennsylvania Constitution of 1776).

364. 5 Thorpe, *supra* note 25, at 2628-29 (see Article III of the New York Constitution of 1777).

365. Cf. *infra* Part V(A).

provided for the continuation of basic law, *i.e.*, the common law and statutes of England, as well as the acts of the provincial General Assembly.

V. EARLY STATEHOOD PERIOD

A. *Whittington v. Polk* (1802)—Judicial Review.

The Constitution of Maryland, as we have seen, was considered fundamental law.³⁶⁶ However, the constitution did not make clear how it was to be interpreted or enforced—by the people, the legislature, the courts, or otherwise.³⁶⁷ As we have also seen, this problem of the enforcement of higher law was as old as the 1632 Charter.³⁶⁸ *Whittington v. Polk*,³⁶⁹ in dictum, established in Maryland the idea of judicial review—that the courts are the primary interpreters and enforcers of the constitution.³⁷⁰ The decision came a year before the United States Supreme Court's famous decision in *Marbury v. Madison*.³⁷¹

Whittington was a decision of Maryland's General Court, a court of both original (trial) and appellate jurisdiction, successor to the Provincial Court, and probably Maryland's most prestigious court at the time.³⁷² The General Court, sitting as a trial court, heard the case of William Whittington, replaced in the office of Chief Justice of certain county courts by William Polk, newly appointed by the Governor to the same office.³⁷³ The General Court held that, according to the constitution, justices of the county courts, such as Whittington, held office for a term of years or until the justices were discharged, and not during good behavior (indefinitely) as did other judges in the state.³⁷⁴ Therefore, the act of the legislature, permitting discharge of Whittington and

366. See *supra* Part IV(C).

367. The United States Constitution also lacks a mechanism for interpretation, spurring Chief Justice John Marshall to proclaim, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

368. See *supra* Part III(A).

369. 1 H. & J. 236 (Md. Gen. Ct. 1802).

370. See *id.* at 244.

371. 5 U.S. 137 (1803). *Marbury* and *Whittington* are compared, contrasted, and criticized in Jed Handelsman Shugartman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58 (2002).

372. See CARROLL T. BOND, *THE COURT OF APPEALS OF MARYLAND, A HISTORY* 88-91 (1928).

373. *Whittington*, 1 H. & J. at 236-39 (The county courts to which Mr. Whittington complained of being disseised were Caroline, Dorchester, Somerset, and Worcester).

374. *Id.* at 248.

appointment of Polk, did not violate the constitution.³⁷⁵ In addition, the General Court held that Whittington had used the wrong writ to recover the office.³⁷⁶ Thus, Whittington having neither right nor remedy, the General Court dismissed his case.³⁷⁷

While the Court's holding was that Whittington was not entitled to continue in office,³⁷⁸ the Court's dictum established judicial review.³⁷⁹ That is, an act of the legislature, repugnant to the constitution, is void and it is the role of the judiciary to determine whether a legislative act is unconstitutional.³⁸⁰ Interestingly, those two propositions, asserted by Whittington, were conceded by Polk,³⁸¹ and agreed to unanimously by the three judges of the General Court.³⁸² Nonetheless, the Court gave its reasons for judicial review.

First, was the nature of the constitution. It was made by the people, the source of all rightful government power.³⁸³ The legislature, like the executive and judiciary, was created by the constitution and therefore subject to it.³⁸⁴ When the legislature exceeds constitutional limits on its power, its act is a nullity.³⁸⁵

The second reason for judicial review was the necessity of some power under the constitution to restrict the legislature when it acts beyond its constitutional authority.³⁸⁶ The power of determining the validity of an act of the legislature cannot be with the legislature itself because it cannot be the judge of the validity of its own act (the definition of despotism) and because the constitution separates the powers of making, judging, and executing the law.³⁸⁷ The power of determining the validity of an act of the legislature cannot be with the people because the right of revolution is too powerful a remedy and the power to elect new legislators is too

375. *Id.* at 248-49.

376. *Id.* at 249-50.

377. *Id.* at 248-50.

378. *Id.* at 250.

379. *Id.* at 242-45.

380. *Id.*

381. *Id.* at 241-42.

382. *Id.* at 242, 251.

383. *Id.* at 242 ("This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.").

384. *Id.* ("The Legislature, being the creature of the Constitution, and acting within a circumscribed sphere, is not omnipotent, and cannot rightfully exercise any power, but that which is derived from that instrument.").

385. *Id.*

386. *Id.* at 242-43.

387. *Id.* at 243.

slow and uncertain a remedy.³⁸⁸ Thus, none of the alternatives to judicial review is satisfactory.³⁸⁹

Third, was the role of the judiciary in determining whether acts of the legislature are unconstitutional.³⁹⁰ The judiciary's duty is to decide questions of law in cases brought before it; however, acts of the legislature beyond its constitutional authority are not law.³⁹¹ The oath of a judge is to do equal right and justice according to law, including the constitution (supreme law) and those acts of the legislature made pursuant to the constitution.³⁹² In a government of separated powers, the legislature is not superior to the other two branches; indeed, the constitution has placed the judiciary as a check on legislative infringements of the constitution.³⁹³

Fourth, there were particular provisions of the constitution supporting judicial review.³⁹⁴ The Constitution of 1776 provided for the judiciary's independence—judges held office during good behavior and were to receive liberal salaries.³⁹⁵ The constitution provided for executive appointment of judges, presumably, persons most distinguished for integrity, experience, and legal knowledge and best qualified to decide legal and constitutional questions.³⁹⁶

Finally, were the safeguards against misuse of judicial review.³⁹⁷ Courts only hear cases properly brought before them, argued by counsel learned in the law, and decided after full consideration.³⁹⁸ Also, judges are removable from office, on conviction of misbehavior.³⁹⁹

Whittington established judicial review under the Maryland Constitution,⁴⁰⁰ like *Marbury* later established judicial review under the United States Constitution.⁴⁰¹ Both cases were brought by claimants to judicial office—*Whittington* alleging his wrongful ouster and *Marbury* asserting a wrongful failure to deliver his commission.⁴⁰² Both cases established judicial review with little danger of retaliation against the judiciary by the legislative and

388. *Id.* at 243-44.

389. *See id.*

390. *Id.* at 244.

391. *Id.*

392. *Id.*

393. *Id.* at 244-45.

394. *Id.* at 245.

395. *Id.*

396. *Id.*

397. *Id.* at 245-46.

398. *Id.* at 245.

399. *Id.*

400. *Id.* at 242-46.

401. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

402. *Marbury*, 5 U.S. at 153-54; *Whittington*, 1 H. & J. at 236.

executive branches.⁴⁰³ While *Whittington* found the courts had power to review the constitutionality of legislation repealing Whittington's rights to office, that conclusion was dictum, because the General Court held on the merits that Whittington had no right under the constitution to judicial office and had sued for the wrong remedy.⁴⁰⁴ While *Marbury* also exercised the power of judicial review and concluded that Marbury had a right to his commission, the Supreme Court held that it had no power under the Constitution to hear the matter, due to Supreme Court jurisdiction being appellate in such a case and not original as Marbury had claimed and Congress had provided.⁴⁰⁵ Both cases, while giving reasons for judicial review, treated their conclusions as routine—*Whittington* saying judicial review had “not been controverted in any of the cases which have been brought before this court,”⁴⁰⁶ *Marbury* saying that judicial review was not a novel doctrine,⁴⁰⁷ but had been approved by several circuit courts, which included Supreme Court justices.⁴⁰⁸ Neither *Whittington* nor *Marbury* referred to the English beginnings of judicial review, its practice in colonial times, the early cases from other states in support, or the advocacy of judicial review in *The Federalist Papers*.⁴⁰⁹ Both cases set forth well-considered justifications for judicial review—the nature of a constitution, the nature of judicial duty, and particular provisions of the constitutions (although the constitutions of Maryland and the United States differed markedly).⁴¹⁰ However, each case had its special points. *Whittington* argued the need for constitutional review, but concluded that neither review by the legislature itself nor by the people was a satisfactory alternative to review by the courts.⁴¹¹ *Whittington* also pointed out safeguards against abuse of judicial review.⁴¹² *Marbury* noted the special binding nature of a written constitution, but excluded from the scope of judicial review the political or discretionary acts of government, as distinguished from acts of government affecting legal rights.⁴¹³

403. *Marbury*, 5 U.S. at 177-80; *Whittington*, 1 H. & J. at 242-45.

404. *Whittington*, 1 H. & J. at 249-50.

405. *Marbury*, 5 U.S. at 175-76.

406. *Whittington*, 1 H. & J. at 242.

407. *Marbury*, 5 U.S. at 176.

408. See generally *Hayburn's Case*, 2 U.S. 409 (1792). See also CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 171-93 (2nd ed. 1932).

409. *THE FEDERALIST* No. 78 (Hamilton), 504-08, No. 81 (Hamilton), 523-27.

410. See Charles A. Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief for Violation of Rights*, 10 U. BALT. L. REV. 102, 107-10 (1980).

411. *Whittington*, 1 H. & J. at 243.

412. *Id.* at 245-46.

413. *Marbury*, 5 U.S. at 176-80.

The *Whittington* dictum was accepted in *State v. Dashiell*,⁴¹⁴ the first reported Court of Appeals case *holding* invalid an act of the legislature as unconstitutional.⁴¹⁵

Thus, *Whittington* dictum established judicial review in Maryland—the judicial determination of the constitutionality of state governmental acts—even before *Marbury v. Madison*.

B. Extending the Franchise (1802, etc.).

What would make the voters—free, white, male, 21 years of age, and property owners—extend voting power to others not having the vote? A revolution! Really, many revolutions.

The idea of universal suffrage of free men, as we have seen, was advocated at the Maryland convention in 1776 by a radical democratic minority and was supported by militia men, called to fight in the revolutionary war for independence.⁴¹⁶ The idea was kept alive by newspaper criticisms of “government for the rich,” by difficulties in administering elections based on the value of property held by voters, and by the ideal of equality from the French Revolution.⁴¹⁷ A bill to establish universal suffrage of free men, proposed by Michael Taney (father of Roger B. Taney, who later became Chief Justice of the United States Supreme Court), passed the House of Delegates in 1797, but failed in the Senate.⁴¹⁸ After Democratic Republicans, headed by Thomas Jefferson for President, were voted into office in 1800, a bill like Taney’s, but revised to exclude free blacks from voting, was passed by both houses in 1801.⁴¹⁹ When confirmed as an amendment to the Maryland Constitution, the next year,⁴²⁰ there was no longer a property qualification for voting for state offices.⁴²¹ An amendment in 1810 eliminated the property qualification for voting for federal officers.⁴²²

[The next change took the Civil War and amendments to the United State Constitution—the Thirteenth Amendment ratified in 1865 abolishing slavery,⁴²³ the Fourteenth Amendment ratified in

414. See 6 H. & J. 268, 270-71 (Md. 1824).

415. *Id.* at 272.

416. See *supra* Part IV(C); see also Richard Walsh, *The Era of the Revolution*, in MARYLAND: A HISTORY 1632-1974 at 148-50 (Richard Walsh & William Lloyd Fox, eds., 1974).

417. See Walsh, *supra* note 416, at 150-52.

418. *Id.* at 151.

419. See 1801 Md. Laws ch. 90.

420. 1802 Md. Laws ch. 20.

421. See *id.*

422. 1809 Md. Laws ch. 83, confirmed by 1810 Md. Laws ch. 33.

423. U.S. CONST. amend. XIII.

1868 conferring citizenship on persons born in this country,⁴²⁴ and the Fifteenth Amendment ratified in 1870 prohibiting denial of the vote on account of race, color, or previous condition of servitude.⁴²⁵ However, these changes, abolishing qualifications of free and white for voting, were not formally made to the Maryland Constitution for some time. The word “free” was deleted from Article I, § 1 of the Constitution of 1864⁴²⁶ and from Article 7 of the Declaration of Rights in the Constitution of 1867.⁴²⁷ The word “white” was excised by constitutional amendments to Article I, § 1 in 1956⁴²⁸ and to Article 7 of the Declaration of Rights in 1972.⁴²⁹

The woman’s suffrage movement nationwide was fed by the successes of other social movements—abolition of slavery, progressive “direct democracy” reforms, and prohibition of alcoholic beverages.⁴³⁰ The Nineteenth Amendment (1920) to the United States Constitution prohibited denial of the vote on account of sex.⁴³¹ That change formally became part of the Maryland Constitution when the word “male” was excised from the Maryland Constitution and Declaration of Rights at the same time as the word “white.”⁴³²

The main impetus for the change in voting age came from the youth culture confronting the Vietnam War and the slogan that a young person old enough to die for his country was old enough to vote.⁴³³ Again, a change to the United States Constitution, the Twenty-Sixth Amendment ratified in 1971, setting 18 years as the legal voting age,⁴³⁴ preceded the formal replacement of 21 years by 18 years in Article I, § 1 of the Maryland Constitution in 1978.⁴³⁵

Thus, a number of revolutionary changes caused the voters—originally, free, white, male, 21 years of age, and property owners—to extend voting power to others.

424. U.S. CONST. amend. XIV.

425. U.S. CONST. amend. XV.

426. See 4 Swindler, *supra* note 25, at 420.

427. See 4 *id.* at 449.

428. 1956 Md. Laws ch. 99, ratified Nov. 6, 1956 (the current provision is located at MD. CODE ANN. CONST. Art. I, § 1 (LexisNexis 2007)).

429. 1971 Md. Laws ch. 357, ratified Nov. 7, 1972 (the current provision is located at MD. CODE ANN. CONST. Art. 7 (LexisNexis 2007)).

430. See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 482-83 (2d ed. 2005).

431. U.S. CONST. amend. XIX.

432. 1956 Md. Laws ch. 99, ratified Nov. 6, 1956 (the current provision is located at MD. CODE ANN. CONST. Art. I, § 1); 1971 Md. Laws ch. 357, ratified Nov. 7, 1972 (the current provision is located at MD. CODE ANN. CONST. Art. 7).

433. CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 148, at 54-64.

434. U.S. CONST. amend. XXVI.

435. 1977 Md. Laws ch. 681, ratified Nov. 7, 1978 (the current provision is located at MD. CODE ANN. CONST. Art. I, § 1).

C. *Reform Amendments (1837–38)—Direct Popular Elections and Legislative Reapportionment.*

What would make the less populous counties give up a greater measure of control of state government to more populous counties? It was the choice between “reform or revolution,” the rallying cry of reformers in 1836.⁴³⁶

The Constitution of 1776 made possible the control of state government by a minority of voters. As we have seen, that constitution apportioned seats in the House of Delegates four to each county and two each to Baltimore City and Annapolis.⁴³⁷ Members of the Senate were selected by electors, chosen in the same proportion—two from each county and one each from Baltimore City and Annapolis.⁴³⁸ The House of Delegates and Senate jointly selected the Governor and Council.⁴³⁹ The Governor and Council appointed almost all the other officers of government, executive or judicial.⁴⁴⁰ Thus, whatever group controlled the House of Delegates could control the rest of the government as well.

The House of Delegates was malapportioned, as the decennial federal census and statewide popular vote totals showed.⁴⁴¹ After 1789, the year in which Allegany County was created, there were no modifications to account for population changes until acts of the 1835–36 legislative session, proposing to increase Baltimore City’s representation in the House of Delegates to four⁴⁴² and proposing to create Carroll County out of parts of Baltimore and Frederick counties.⁴⁴³ However, in order to amend the constitution, those acts needed confirming at the next legislative session (which they were).⁴⁴⁴

The reformers wanted more—a complete reapportionment of the House of Delegates, direct popular election of the Governor,

436. See REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 38-39 (1967) [hereinafter REPORT OF THE COMMISSION]; A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland’s Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 346-366 (1962); FLETCHER MELVIN GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860: A STUDY IN THE EVOLUTION OF DEMOCRACY 240-45 (1930).

437. See *supra* Part IV(C).

438. See *supra* Part IV(C).

439. See *supra* Part IV(C).

440. See *supra* Part IV(C).

441. BRUGGER, *supra* note 113, at 228.

442. 1835 Md. Laws ch. 98.

443. 1835 Md. Laws ch. 256.

444. 1836 Md. Laws ch. 76; 1836 Md. Laws ch. 19, respectively.

senators, judges, and local officials, and abolition of the Governor's Council.⁴⁴⁵

Dubious that the malapportioned General Assembly would adopt their program, the reformers held a bipartisan "reform convention" in June, 1836.⁴⁴⁶ The convention recommended that the General Assembly act to take "the sense of the people" about calling a constitutional convention and, if the General Assembly failed to act, the reform convention would meet again to decide on further action, such as establishing a new government under a revised constitution.⁴⁴⁷

The September, 1836 vote for senatorial electors provided further evidence of malapportionment. The Democrats, the party of Jefferson and Jackson, won a state-wide majority of votes.⁴⁴⁸ The Democrat electors, generally being from the more populous counties, represented an even larger majority of the state's population.⁴⁴⁹ However, the anti-Jackson party, the Whigs, elected a narrow majority of twenty-one of the forty senatorial electors.⁴⁵⁰ That majority gave the Whig electors the opportunity to select *all* the senators, if voting followed party lines (as it usually did).

The Democrats, now calling themselves the party of "reform," acted.⁴⁵¹ The nineteen Democrat senatorial electors refused to meet with the twenty-one Whig electors, unless they agreed to select senators who would call a convention to reform the constitution.⁴⁵² If the Democrat electors held out, there could be no selection of senators, because a quorum of twenty-four electors was required under Article 15 of the Constitution of 1776.⁴⁵³ In addition, there could be no General Assembly without a Senate, and no selection of a new Governor and Council by the House of Delegates and Senate jointly.⁴⁵⁴

When the Whigs refused to commit to calling a constitutional convention, each party took its case to the people.⁴⁵⁵ The Democrats called for "reform or revolution."⁴⁵⁶ The Whigs campaigned for order—change according to the constitution—not

445. See BRUGGER, *supra* note 113, at 229; see also *supra* note 436.

446. See REPORT OF THE COMMISSION, *supra* note 436, at 38-39.

447. See *id.*

448. See BRUGGER, *supra* note 113, at 229.

449. See *id.* at 229; see also Hagensick, *supra* note 436, at 348-49.

450. See BRUGGER, *supra* note 113, at 229.

451. See sources cited *supra* note 436.

452. See BRUGGER, *supra* note 113, at 229.

453. 4 Swindler, *supra* note 25, at 378.

454. 4 *id.* at 379.

455. See generally Hagensick, *supra* note 436.

456. See generally *id.*

anarchy.⁴⁵⁷ The Whigs won large majorities in the election of members of the House of Delegates in October, 1836 and again in the election of presidential electors in November, 1836.⁴⁵⁸ The Democrats' cause was further damaged when Whig Governor Thomas W. Veazey called a special session of the General Assembly—the newly-elected House of Delegates, and the old Senate—in order to prevent a constitutional crisis.⁴⁵⁹ Whig victories in the October and November elections and the Governor's action ended the stalemate of a lack of quorum for the senatorial electors.⁴⁶⁰ Five of the nineteen Democrat electors, who had been holding out, met with the twenty-one Whig electors to select a new Senate.⁴⁶¹

However, the Democrats continued to push for reform at another "reform convention" in November, 1836.⁴⁶² The convention proposed amendments to the constitution, which the Democrats pressed on the newly elected General Assembly.⁴⁶³ At its regular session beginning in December, 1836, the majority-Whig General Assembly moved, not for recrimination, but for reform.⁴⁶⁴ A special committee of the House of Delegates was selected to consider enacting a treason law to punish any conspiracy to alter the constitution other than by constitutional means (two successive acts of the legislature).⁴⁶⁵ However, that committee reported that a majority of the people had a *right* to change the constitution.⁴⁶⁶ Also, the committee reported that sufficient checks for any conspiracy against the constitution already existed—public opinion, the militia powers of the executive under the constitution, the common law of conspiracy, and a statute penalizing overthrow of the government.⁴⁶⁷

Early in 1837, as we have seen, the General Assembly confirmed the proposals made in the 1835–36 legislative session to increase from two to four Baltimore City's representation in the House of Delegates and to create Carroll County out of parts of Baltimore and Frederick counties.⁴⁶⁸ Then, the General Assembly

457. See generally *id.*

458. See generally *id.*

459. See generally *id.*

460. See generally *id.*

461. See generally *id.*

462. See generally *id.*

463. See generally *id.*

464. See *id.* at 357.

465. The report of the select committee of the House of Delegates is set forth in C.S. Ridgely, et al., *Constitution of Maryland*, NILES' WEEKLY REGISTER 73 (Apr. 1, 1837).

466. See *id.* at 74.

467. See *id.* at 73–74.

468. See statutes cited *supra* note 442–44.

proposed broad reforms of the constitution,⁴⁶⁹ confirmed the next year.⁴⁷⁰ Those proposals included much of the reformers' earlier program.

One set of reforms was to provide for direct popular election of more state officials. As we have seen, under the Constitution of 1776, voters directly elected only members of the House of Delegates and county sheriffs.⁴⁷¹ The reform amendments provided for the direct election of senators in Section 3 (one each from the counties and Baltimore City) and also the Governor in Section 20.⁴⁷²

Another reform was to reapportion the House of Delegates. As we have seen, under the Constitution of 1776 each county elected four delegates; Baltimore City and Annapolis each elected two.⁴⁷³ (The recent 1836 constitutional amendment had increased Baltimore City's delegation to four. Section 9 of the reform amendments provided for elimination of Annapolis' representation separate from Anne Arundel County after the 1840 census.)⁴⁷⁴ The reform amendments provided for representation in the House of Delegates more closely based on population. Section 10, effective after the 1840 census, allotted three to six delegates, on a graduated population scale, to each of the counties and Baltimore City.⁴⁷⁵ Section 3 also awarded Baltimore City a seat in the Senate.⁴⁷⁶

Section 13 abolished the Governor's Council.⁴⁷⁷ Section 14 provided for appointments of government officials by the Governor with the advice and consent of the Senate, although Section 15 permitted the Governor to fill vacancies temporarily, when the Senate was not in session.⁴⁷⁸

The reformers did not get everything they wanted. Some compromise between reformers, generally from the populous counties, and conservatives, generally from the less populous agrarian counties, is apparent in the reform amendments. The office of Governor, elected for three-year terms, rotated among three gubernatorial districts—eastern, southern, and northwestern.⁴⁷⁹ Only the House of Delegates, not the Senate, was

469. 1836 Md. Laws ch. 197 (Act of Mar. 10, 1837).

470. 1837 Md. Laws ch. 84 (Act of Feb. 13, 1838).

471. See *supra* Part IV(C).

472. 4 Swindler, *supra* note 25, at 387, 390-91.

473. See *supra* Part IV(C).

474. 4 Swindler, *supra* note 25, at 388.

475. 4 *id.* at 388-89.

476. 4 *id.* at 387-88.

477. 4 *id.* at 389.

478. 4 *id.*

479. 4 *id.* at 390-91.

apportioned by population. In addition, the amendments did not provide for direct, popular election of judges or local officials. The interest of the agrarian counties was protected by Section 26, which expressly preserved slavery, unless its abolition was proposed and confirmed by unanimous votes of both houses of successive sessions of the General Assembly with full compensation to masters for the loss of slave property.⁴⁸⁰

Since the reform amendments of 1837–38, the principle of direct popular election of government officials has been extended. The Constitution of 1851 broadened those elections to the offices of Comptroller of the Treasury, judges, clerks of court, county commissioners, state's attorneys, orphan's court judges, and registers of wills.⁴⁸¹

[The Constitution of 1864 further extended elections to Lieutenant Governor and Attorney General.⁴⁸²

The principle of legislative apportionment on a population basis has also been extended. Additional new counties have been created—Howard under the Constitution of 1851,⁴⁸³ Wicomico under the Constitution of 1867,⁴⁸⁴ and Garrett in 1872, as provided in the Constitution of 1851.⁴⁸⁵ The Constitutions of 1851,⁴⁸⁶ 1864,⁴⁸⁷ and 1867⁴⁸⁸ and later amendments in 1901⁴⁸⁹ and 1922⁴⁹⁰ each reapportioned seats in the House of Delegates and provided for further reapportionment after each decennial census.⁴⁹¹ The 1864⁴⁹² and 1867⁴⁹³ constitutions also provided greater representation for Baltimore City in the Senate by dividing the City into three districts, each district being entitled to a senator; later amendments in 1901⁴⁹⁴ and 1922⁴⁹⁵ divided the City into, first, four districts and, then, six districts, each with a senator.⁴⁹⁶

480. 4 *id.* at 391-92.

481. MD. CONST. of 1851, art. VI, § 1; *id.* at art. IV, §§ 4, 8, 12, 13, 19; *id.* at art. IV, §§ 14, 16; *id.* at art. VII, § 8; *id.* at art. V, § 1; *id.* at art. IV, § 17; *id.* at art. IV, § 18, respectively. See also 4 Swindler, *supra* note 25, at 404-13.

482. 4 Swindler, *supra* note 25, at 423, 436.

483. MD. CONST. of 1851 art. VIII, § 1.

484. MD. CONST. of 1867 art. XIII, §§ 2-5.

485. See MD. CONST. of 1851 art. VIII, § 2.

486. MD. CONST. of 1851 art. III, § 3.

487. MD. CONST. of 1864 art. III, § 4.

488. MD. CONST. of 1867 art. III, §§ 3-4.

489. 1900 Md. Laws ch. 432, ratified Nov. 5, 1901.

490. 1922 Md. Laws ch. 20, ratified Nov. 7, 1922.

491. See *supra* notes 486-90 and accompanying text.

492. MD. CONST. of 1864 art. III, §§ 2-3.

493. MD. CONST. of 1867 art. III, § 2.

494. 1900 Md. Laws ch. 469, ratified Nov. 5, 1901.

495. 1922 Md. Laws ch. 7, ratified Nov. 7, 1922.

496. See *supra* notes 492-95.

Otherwise, the principle of legislative apportionment on a population basis was largely ignored after 1867. The problems of legislative malapportionment in Maryland and the failure of popular remedies are described in the United States Supreme Court case of *Maryland Committee for Fair Representation v. Tawes*,⁴⁹⁷ a companion case to *Reynolds v. Sims*.⁴⁹⁸ Those cases held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires "one person, one vote."⁴⁹⁹ That is, the seats in *both* houses of a state legislature must be allocated to districts with substantial equality of population, and the districts must be revised after each decennial census.⁵⁰⁰ That holding was formalized in amendments in 1970 to the Maryland Constitution, Article III, §§ 3-5.⁵⁰¹]

Thus, the reform amendments of 1837-38, resulting from a threat of "reform or revolution," helped establish the principles of direct popular election of government officials and reapportionment of the legislature based on population.

D. Constitution of 1851—"The Sense of the People."

How is the idea of popular sovereignty, where the will of the people may change over time, to be reconciled with the rule of law under a written constitution?

The answer in 1776 was to let the voters of the state elect members of a convention, which, along with governing the state, adopted a constitution (without popular ratification).⁵⁰² That Constitution of 1776, in Article 59 of its Form of Government and Article 42 of its Declaration of Rights, provided for constitutional change by a bill passing two successive legislatures.⁵⁰³ Many changes to that constitution were made, including the extensive reform amendments of 1837-38.⁵⁰⁴ Indeed, the constitution had been "reformed" so often that some persons thought it had become *deformed*.⁵⁰⁵

497. 377 U.S. 656 (1964).

498. 377 U.S. 533 (1964).

499. See *Tawes*, 377 U.S. at 673-74; *Reynolds*, 377 U.S. at 559.

500. See *Reynolds*, 377 U.S. at 568-69.

501. 1969 Md. Laws ch. 785, ratified Nov. 3, 1970.

502. See *supra* Part IV(C).

503. See 4 Swindler, *supra* note 25, at 375, 383.

504. See *supra* Part V(C).

505. This description of events, relating to the Constitution of 1851, is based on convention proceedings, PROCEEDINGS OF THE MARYLAND STATE CONVENTION TO FRAME A NEW CONSTITUTION [hereinafter PROCEEDINGS 1851]; convention debates, DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION (1851) [hereinafter DEBATES AND PROCEEDINGS]; and commentaries, REPORT OF THE COMMISSION, *supra* note 436,

Yet, the agitation for reform continued. The growing populations in the western counties and the City of Baltimore wanted more representatives in the legislature.⁵⁰⁶ Democratic reformers wanted election of more government officers, including judges and county officials.⁵⁰⁷ Most everyone wanted reform of government finances: extensive state investments in internal improvements during the 1830's, such as the Chesapeake and Ohio Canal and the Baltimore and Ohio Railroad, created a large debt, the interest on which (notwithstanding new taxes) could not be paid during most of the 1840's.⁵⁰⁸ Even some conservatives wanted a way to end the continued "agitation" for changing the constitution.⁵⁰⁹

The legislature was an unlikely agent of constitutional change. The extensive reforms, adopted by it in 1837–38, had failed to quiet the agitation for reform. Legislators from the Eastern Shore and the southern counties were unwilling to endanger the system of slavery or jeopardize the apportionment of delegates and allocation of senators favoring their sections of the state.⁵¹⁰ Too, a constitutional amendment passed in 1846⁵¹¹ and confirmed in 1847⁵¹² substituted biennial (once every two years) for annual sessions of the legislature.⁵¹³

Nonetheless, in 1850 the legislature passed a law for taking "the sense of the people" as to calling a constitutional convention, to be elected by the people.⁵¹⁴ The legislature was prodded by Governor Philip Francis Thomas, whose election motto had been "reform, retrenchment, and convention," and by a state-wide "reform convention," selected by a number of county reform conventions.⁵¹⁵ Of course, since Massachusetts in 1780,⁵¹⁶ many other states had adopted new constitutions, proposed by popularly-elected constitutional conventions and then ratified by the people.⁵¹⁷

at 43-50, and JAMES WARNER HARRY, *THE MARYLAND CONSTITUTION OF 1851* (J.H. Hollander et al., eds., 1902).

506. See *DEBATES AND PROCEEDINGS*, *supra* note 505, at 106-09; *REPORT OF THE COMMISSION*, *supra* note 436, at 44-45.

507. See *REPORT OF THE COMMISSION*, *supra* note 436, at 47-48.

508. See *DEBATES AND PROCEEDINGS*, *supra* note 505 at 338-40; *REPORT OF THE COMMISSION*, *supra* note 436, at 45, 48.

509. See *REPORT OF THE COMMISSION*, *supra* note 436, at 44.

510. See *id.* at 44, 49.

511. 1845 Md. Laws ch. 269 (Act of Feb. 21, 1846).

512. 1846 Md. Laws ch. 306 (Act of Mar. 5, 1847).

513. See *supra* notes 511-12 and accompanying text.

514. 1849 Md. Laws ch. 346 (Act of Feb. 21, 1850); see also *PROCEEDINGS 1851*, *supra* note 505, at 23.

515. See generally *DEBATES AND PROCEEDINGS*, *supra* note 505.

516. Perry, *supra* note 25, at 368.

517. MADDEX, *supra* note 19, at xxxii-xxxvii.

The 1850 law, for taking "the sense of the people" as to calling a constitutional convention, had three important checks on a convention, if the people approved its call. First, the convention could not alter the system of slavery.⁵¹⁸ Second, the number of a county's delegates in the convention was to be the same as its total number of representatives in the legislature, where the counties and Baltimore City each had from three to six delegates, allotted by population, and the counties and Baltimore City each had one senator.⁵¹⁹ Third, the constitution adopted by the convention would be submitted to the people for their approval.⁵²⁰

At the May election for taking "the sense of the people," Marylanders voted over four to one for a constitutional convention.⁵²¹ Pursuant to the 1850 law, an election was held in September, 1850, delegates elected, and a convention called in November of the same year.⁵²²

The propriety of constitutional change by convention was debated at the 1850-51 convention, as it had been earlier in the legislature when the 1850 law was proposed.⁵²³ Opponents of convention believed that the exclusive mode of change, pursuant to the express terms of the Constitution of 1776, was by acts of two successive legislatures.⁵²⁴ Proponents of convention believed that the constitutionally-prescribed method was not exclusive, but that the people had the unalienable right, one recognized by Articles 1, 2, and 4 of the Declaration of Rights of the Constitution of 1776, to make constitutional changes by convention or otherwise.⁵²⁵ [The power of the people to make constitutional changes by ways, other than those specified by the constitution, was later approved by the Court of Appeals of Maryland in *Anderson v. Baker*,⁵²⁶ upholding a provision of the Constitution of 1864 produced by a convention which was called by the legislature other than by the constitutionally-prescribed method,⁵²⁷ and again in *Board of Supervisors of Elections v. Attorney General*,⁵²⁸ approving the legality of a convention which was also to be called by the

518. 1849 Md. Laws ch. 346 (Act of Feb. 21, 1850).

519. *Id.*

520. *Id.*

521. *See generally* DEBATES AND PROCEEDINGS, *supra* note 505.

522. 1849 Md. Laws ch. 346 (Act of Feb. 21, 1850); *see also* PROCEEDINGS 1851, *supra* note 505, at 23.

523. *See* REPORT OF THE COMMISSION, *supra* note 436, at 43-44.

524. *See generally* DEBATES AND PROCEEDINGS, *supra* note 505.

525. *See* REPORT OF THE COMMISSION, *supra* note 436, at 45; *see also* 4 Swindler, *supra* note 25, at 372-73.

526. 23 Md. 531 (1865).

527. *Id.* at 628-29.

528. 246 Md. 417, 229 A.2d 388 (1967).

legislature, rather than by the constitutionally-prescribed method.^{529]}

Although the 1850–51 convention included much party and sectional bickering and many of its members were disillusioned by the experience, the convention did compromise on a constitution in its allotted seven months of deliberations by May, 1851.⁵³⁰ At the legislatively-mandated election in June, the people approved the adoption of the new constitution by more than a three to two margin.⁵³¹

The Constitution of 1851⁵³² was a compromise. The Eastern Shore and southern counties succeeded in preserving slavery⁵³³ and county representation in the Senate.⁵³⁴ As we have seen, the western counties won greater representation by creation of a new Howard County out of Anne Arundel County and by provision for the later creation of a new county (Garrett) out of Allegany County.⁵³⁵ The City of Baltimore won greater representation by a reapportionment of the House of Delegates, reducing the minimum number of delegates for a county from three to two and increasing the number of delegates for Baltimore City to ten (four more than the most populous county, Baltimore County, which was given six).⁵³⁶ As we have seen, democratic reformers succeeded in getting election (rather than appointment) of many more state and local officers—Comptroller of the Treasury, judges, clerks of courts, county commissioners, state’s attorneys, orphan’s court judges, and registers of wills.⁵³⁷ Government finances were reformed—debt and credit were regulated by Article III, § 22, taxes were superintended under Article VI, and public works were overseen under Article VII, §§ 1–3.⁵³⁸

Notably, the Constitution of 1851 provided for popular participation in constitutional change. That constitution replaced the 1776 approach—change only by a bill passing two successive legislatures—with Article XI providing for a regular (after each

529. *Id.* at 438–45, 229 A.2d at 400–03.

530. *See* REPORT OF THE COMMISSION, *supra* note 436, at 43–45.

531. *See id.* at 44.

532. 4 Swindler, *supra* note 25, at 393–415; CONSTITUTIONAL REVISION STUDY DOCUMENTS, *supra* note 148, at 413–42; NILES, *supra* note 148, at 396–429; 3 Thorpe, *supra* note 25, at 1712–41; 1 DEBATES AND PROCEEDINGS, *supra* note 505, at 3–20.

533. 4 Swindler, *supra* note 25, at 404 (art. III, § 43).

534. 4 *id.* at 399 (art. III, § 2).

535. *See supra* Part V(C).

536. 4 Swindler, *supra* note 25, at 413 (art. III, § 3).

537. *See supra* Part V(C).

538. 4 Swindler, *supra* note 25, at 401–02, 410, 411–12.

decennial census) taking of "the sense of the people" as to calling a constitutional convention.⁵³⁹

The idea of taking "the sense of the people" had been raised before. As we have seen, an ad hoc "reform convention" in 1836 recommended the idea to the legislature, which, instead, eventually adopted reform amendments (1837-38).⁵⁴⁰ A bill in the December, 1845 session of the House of Delegates, which would have provided for taking "the sense of the people" as to calling a constitutional convention, failed on a 39-39 vote.⁵⁴¹ As we have seen, the Constitution of 1851 itself was the product of a convention, called after "the sense of the people," favoring the convention, was taken.⁵⁴²

However, the Constitution of 1851 seemed more designed to squelch, than promote, participation of the people in constitutional change and, indeed, to squelch constitutional change itself. Although the 1850 law, leading to the convention, made the proposed constitution subject to ratification by the people, Article XI provided for no popular ratification of amendments made by future conventions.⁵⁴³ Article XI also required that the number of a county's delegates in any convention be the same as its total number of representatives in the legislature, rather than requiring that delegates be apportioned strictly on the basis of population.⁵⁴⁴ Of course, legislative malapportionment had been a principal source of discontent and call for reform. The convention debates on the subject of constitutional change indicate a good deal of criticism of all the "agitation" for reform; indeed, a principal purpose of Article XI seemed to be to end that agitation.⁵⁴⁵

The Constitution of 1851 appeared to make reform by constitutional convention, if called pursuant to a majority in "the sense of the people" decennial vote, the exclusive way to change the constitution.⁵⁴⁶ That was the only means provided by Article XI.⁵⁴⁷ Proposals to authorize the legislature (without taking "the sense of the people") to call a constitutional convention, were rejected by the convention.⁵⁴⁸ The mode of change under the

539. 4 *id.* at 415.

540. See *supra* Part V(C).

541. JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND 256, 412-20 (1845) (Page 256 of the journal sets forth the committee minority report, while pages 412 to 420 detail the proceedings).

542. See *supra* note 514 and accompanying text.

543. 4 Swindler, *supra* note 25, at 415.

544. 4 *id.*

545. See REPORT OF THE COMMISSION, *supra* note 436, at 45.

546. 4 Swindler, *supra* note 25, at 415.

547. 4 *id.*

548. DEBATES AND PROCEEDINGS, *supra* note 505, at 223, 359-60, 379-80.

Constitution of 1776, by a bill passing two successive legislatures, was also rejected by the convention.⁵⁴⁹ The two provisions in the Declaration of Rights, dealing with constitutional change, were expressly limited—Article 1 restricted the people's right "to alter, reform, or abolish their form of government" to changes made "according to the mode prescribed in this constitution" and Article 43 provided that "this constitution shall not be altered, changed, or abolished, except in the manner therein prescribed and directed."⁵⁵⁰

[The Constitution of 1851 was not amended before 1864, when a revised constitution was adopted.⁵⁵¹

Since the Constitution of 1851, the idea of regularly taking "the sense of the people," as to calling a constitutional convention, has been continued, modified, and supplemented with other methods of constitutional change. Provisions of later constitutions—Article XI, § 3 of the Constitution of 1864⁵⁵² and Article XIV, § 2 of the Constitution of 1867⁵⁵³—continued the practice of taking "the sense of the people," which remains in the current constitution.

However, the practice has been modified. The Constitution of 1864 increased the interval for taking "the sense of the people" from ten to twenty years,⁵⁵⁴ a change which remains in the current constitution.⁵⁵⁵ (The regular interval has not been adhered to—"the sense of the people" has been taken at times not specified, notably in preparation for the constitutional conventions called in 1864,⁵⁵⁶ 1867,⁵⁵⁷ and 1967,⁵⁵⁸ and has not been taken at other times although specified.⁵⁵⁹ The ten-year interval had followed the federal decennial census, while the twenty-year period follows every second census and conforms with Thomas Jefferson's idea from the revolutionary era that an opportunity for state constitutional revision should be provided regularly—every generation of 19 or 20 years.⁵⁶⁰ Provisions of later constitutions—Article XI, §§ 1, 3 of the Constitution of 1864⁵⁶¹ and Article XIV,

549. *Id.*

550. 4 Swindler, *supra* note 25, at 393, 396.

551. 4 *id.* at 340.

552. 4 *id.* at 443.

553. 4 *id.* at 477.

554. 4 *id.* at 443.

555. MD CONST. art. XIV, § 2.

556. 1864 Md. Laws ch. 5.

557. 1867 Md. Laws ch. 327.

558. 1966 Md. Laws ch. 501.

559. See REPORT OF THE COMMISSION, *supra* note 436, at 65 (detailing a list of votes on "the sense of the people" taken over the years).

560. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON, WRITINGS 1395, 1402 (1984).

561. 4 Swindler, *supra* note 25, at 442-43.

§§ 1–2 of the Constitution of 1867—also made any constitutional change, adopted by a convention, subject to popular ratification, a principle which remains in the current constitution.^{562]}

As we have seen, the Constitution of 1851 was itself subject to popular ratification.⁵⁶³ (The idea of popular approval of proposed constitutional amendments was, apparently, first used in Maryland to get the voters' endorsement of the amendment, described above, passed by the legislature in 1846 and confirmed by it in 1847, to substitute biennial for annual sessions of the legislature.)⁵⁶⁴

While “the sense of the people” procedure has had a checkered history, it is an important symbol of the people's consent to their form of government. Of course, that consent may be implied from the people's acquiescence by not leaving the state, by not revolting, and by enjoying the benefits of state laws, exercising the political rights of speech, association, and petition, voting in elections, and holding office. However, “the sense of the people,” as Jefferson said, gives the people a periodic right to choose for themselves the government they wish.⁵⁶⁵

[Since the Constitution of 1851, change by a convention called after taking “the sense of the people” has been supplemented by alternative means. Article XI, § 1 of the Constitution of 1864⁵⁶⁶ adopted the method, carried over in Article XIV, § 1 of the Constitution of 1867, of amending the constitution by a legislative proposal, adopted by three-fifths vote of each house and ratified by the people.⁵⁶⁷ Article XI, § 2 of the Constitution of 1864 also provided for the legislature at any time to recommend to the people that a constitutional convention be called and, if a majority of the voters agreed, for the legislature to call a convention;⁵⁶⁸ however, this provision was not carried over in the Constitution of 1867.

Maryland has never provided constitutional change by two modes used in other states—by initiative petition of the people⁵⁶⁹ and by the work of (an expert) revision commission,⁵⁷⁰ both subject to electoral ratification.⁵⁷¹ However, Governor J. Millard Tawes did appoint a Constitutional Convention Commission in 1965 to inquire into the need for changing the constitution and for

562. 4 *id.* at 477.

563. See PROCEEDINGS 1851, *supra* note 505, at 751.

564. See *supra* note 511-13 and accompanying text.

565. Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 560.

566. 4 Swindler, *supra* note 25, at 442-43.

567. 4 *id.* at 477.

568. 4 *id.* at 443.

569. See MADDEX, *supra* note 19, at xxiv.

570. See *id.* at 72, 195.

571. See *id.* at xxiv, 72, 195.

preparing to call a convention.⁵⁷² The Commission recommended a complete revision of the constitution by a constitutional convention, which was called pursuant to a special vote taking “the sense of the people” on the subject.⁵⁷³ However, the 1967–68 convention’s proposed constitution was rejected by the voters.⁵⁷⁴]

Thus, the Constitution of 1851 provided for popular participation in constitutional change by taking “the sense of the people” as to calling a constitutional convention.

VI. CONCLUSION

This early history has shown a remarkable evolution of the Maryland Constitution. At the beginning, the “constitution” was the 1632 Charter of Maryland, a grant, written in Latin (and against the backdrop of the largely unwritten English constitution), from the British King to a noble family.⁵⁷⁵ By the end of this period in 1851, Maryland’s Constitution was a home-grown, regularly-reconsidered compact of the people written in their own language.⁵⁷⁶

As the later developments suggest, the end of the period left a good deal of unfinished business, particularly, ending slavery, providing people of color and women full legal rights, and reapportioning legislative seats on the basis of population.⁵⁷⁷ Other important later developments included establishing public schools,⁵⁷⁸ empowering the executive,⁵⁷⁹ adopting the referendum,⁵⁸⁰ regularizing county and municipal home rule,⁵⁸¹ and reorganizing the courts.⁵⁸²

572. See REPORT OF THE COMMISSION, *supra* note 436, at 419-20.

573. See *id.* at 65.

574. See JOHN P. WHEELER, JR. & MELISSA KINSEY, *MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-1968* at 1-2 (1970); cf. Dan Friedman, “*Magnificent Failure*” Revisited: *Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528 (1999) (stating how many of the convention’s proposals were subsequently adopted piecemeal).

575. See *supra* Part III(A).

576. See *supra* Part V(D).

577. See *supra* Part V(B), V(D).

578. MD. CONST. art. VIII § 1 (added by the 1867 Constitution); see also MD. DECL. OF RTS. art. 43 (amended by Chapter 65, Acts of 1960, ratified Nov. 8, 1960).

579. See, e.g., MD. CONST. art. II, §§ 17, 24; *id.* at art. III, § 52.

580. MD. CONST. art. XVI (added by Chapter 673, Acts of 1914, ratified Nov. 2, 1915).

581. MD. CONST. art. XI-F (added by Chapter 493, Acts of 1965, ratified Nov. 8, 1966).

582. MD. CONST. art. IV, §§ 41-A to 41-I (added by Chapter 789, Acts of 1969, ratified Nov. 3, 1970 (containing provisions relating to the Maryland District Courts)), § 14A (added by Chapter 10, Laws of 1966, ratified Nov., 8, 1966 (empowering the General Assembly to create an intermediate appellate court)).

This unfinished business is open-ended. Because the Maryland Constitution provides means for its amendment, the evolution may include, literally, "what have you."